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The Law Commission

Working Paper No. 103

Criminal Law
Binding Over: The Issues

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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultative document, completed for publication on 14 August 1987, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on the consultative document before 31 March 1988.

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The Law Commission

Working Paper No. 103

Criminal Law
Binding Over: The Issues

LONDON
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THE LAW COMMISSION

WORKING PAPER NO. 103

BINDING OVER : THE ISSUES

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THE LAW COMMISSION

WORKING PAPER NO. 103

BINDING OVER : THE ISSUES

SUMMARY

In this Working Paper, the Law Commission examines the power to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law together with related legislation. These ancient powers are used by magistrates' courts, and less frequently the Crown Court, to make orders against individuals in many different contexts. The practical uses of binding over orders are identified and discussed. The paper finds the law on binding over to be complex and, in a number of respects, uncertain. It concentrates on the issues of principle underlying the existence and operation of these powers which need to be resolved before any proposals on detailed changes to the existing law are made.

Comments are invited from interested parties on the appropriate role for binding over in a modern legal system and on the options for reform, which include abolition of the powers, put forward in this paper.

THE LAW COMMISSION

WORKING PAPER NO.103

CRIMINAL LAW

BINDING OVER : THE ISSUES

PART I : THE CURRENT LAW

(1) INTRODUCTORY

1.1 In November 1980 the Law Commission received a reference from the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965 as follows:

> "To examine the power to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law together with related legislation, to consider whether such a power is needed and if so, what its scope should be, and to recommend legislation accordingly, including such legislation upon procedural and any other matters as appear to be necessary in connection therewith."

1.2 The above reference was given after the Home Office had enquired whether the Law Commission was willing to consider binding over in the context of its review of public order offences and the Commission had said that it was willing to do so. Upon consideration it appeared to the Commission that the topic of binding over reached beyond the bounds of the substantive criminal law and to that extent did not form part of any existing programme of the Commission. Accordingly, a specific reference was sought and given.

1.3 Subsequent study of published work and statistics, as well as advice offered by those experienced in the use of the power, suggested that certain important aspects of the exercise of the power were not documented in any systematic way and that, without further research, no proposals could be made which were in all respects founded on a reliable picture of the facts. This further research was undertaken between September 1983 and May 1984 by means of two series of questionnaires addressed to magistrates' courts' officers, which were drafted and distributed with the assistance of the Statistics Branch of the Lord Chancellor's Department. The present Working Paper takes account of the results of that research, summarised in chapter 4 below, together with other studies undertaken by the Commission relating to the historical and comparative aspects of the subject. Material taken from these appears at paragraphs 2.1 to 2.3 and chapter 10 below.

1.4 This Working Paper recommends no single course of action on binding over. The object, rather, is to present a number of options for reform of this area of law and to invite comments from interested parties. The current law is complex and in several respects quite uncertain. Considerable difficulty would be experienced in reforming both the principle and the procedural detail. In this Working Paper we focus upon the issues of principle involved because we feel that their resolution should precede any proposals on detailed changes to the existing arrangements. Whilst a number of rather different powers shelter under the umbrella of "binding over", we take the view that it is appropriate and helpful to sub-divide them, according first to whether or not the powers are exercised in consequence of the bringing of a criminal charge and second, if so, whether the matter is pursued to a conviction. Accordingly, in what follows distinctions are drawn between the use of binding over powers under common law, the Justices of the Peace Act 1361 or related powers on the one hand and under section 115

of the Magistrates' Courts Act 1980, on the other. A further distinction is drawn between the use of binding over powers at a stage prior to conviction and their use at the sentencing stage.

1.5 Despite the antiquity of some of the powers under review, any proposals for change must be seen in the context of other important recent law reform, in particular the alterations made to police powers of arrest by the Police and Criminal Evidence Act 1984, changes in prosecution arrangements after the enactment of the Prosecution of Offences Act 1985 and the restructuring of public order offences under the Public Order Act 1986.

1.6 The Commission is most grateful to Mr. Martin Wasik LL.B., Senior Lecturer in Law at the University of Manchester, who was invited by us in May 1986 to prepare this Working Paper in collaboration with us. The views expressed, however, are those of the Commission.

(2) ORIGIN AND SCOPE OF POWERS

2.1 The origins of powers to bind over are uncertain but have been traced back, in one form or another, to the 10th century.[1] English law apparently had oaths for good behaviour, as well as bonds, from early in that century until late in the 19th century. The 10th century also produced numerous laws which combined suretyship with local self-policing. By the end of the 12th century, enforcement of oaths of the peace was entrusted to knights assigned for the purpose - here originated the office of conservator of the peace from which the office of Justice of the Peace developed in the 14th century. The first commissions of the peace giving power to Justices of the Peace to hear and determine criminal cases were issued in 1328. The next 30 years were a period of experimentation, the Justices of the Peace sometimes having the power to judge, sometimes not, as the lords of the manors resisted in Parliament what seemed to them a new and doubtful form of Royal Justice. This period included the first part of the Hundred Years War (1337-1453). In 1348/49 came the great plague. There was enormous upheaval in the social fabric of the time. In 1360 a treaty of peace was signed at Bretagni, a small town near Paris, and the war was halted temporarily. It was realised that some of the troops who had been living on the spoils of war were likely to return to England, pillaging and robbing along the highways. This prospect did not please Parliament, including the merchants who had loaned money to the King for the war. So in the winter of 1360/61

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1. Written evidence appears in Athelstan's reign where the king changed the law so that one under 15 years of age could only be put to death for an offence if he resisted or fled: "if he surrendered himself, he was only to be imprisoned until some of his relations or friends would become security for him [until he has discretion] ut semper ab omni malo abstineat" (that always he abstains from all wickedness). This is from a note by Emlyn ed. in Hale, The History of the Pleas of the Crown (1736), i.23; citing Wilkins, Anglo-Saxon Laws (1721), p.70.

they made the Act which became the Justices of the Peace Act 1361.

2.2 The Act gave specific powers to the Justices to commit to prison, until dealt with later at sessions, all "vagabonds" who were found by "indictment or suspicion" to have been "pillors or robbers in the parts beyond the sea" and who were "unwilling to labour as they were wont in times past", but this was not to apply to those who were of "good fame" where found (i.e. in England), who merely had to give "sufficient surety and mainprize of their good behaviour towards the King and his people". This was probably no more than a provision as to bail, but by the late 16th and early 17th centuries, mainly through the influence of writers such as Coke,[2] the power to bind over was being exercised in respect of persons not of good fame, this practice apparently being based upon a misreading of the Act but generating a practice quite similar to that which operates today. Blackstone's summary of the law in 1769,[3] based upon Coke and Hawkins, proved influential as authority in the 19th and early 20th Centuries, when the status of the power to bind over was declared to be beyond dispute, as being founded both on the common law (the powers of the conservators of the peace) and on the 1361 statute. The phrase "not of good fame" had been widely construed over the years. Blackstone's assessment was that "a man may be bound to his good behaviour for causes of scandal contra bonos mores, as well as contra pacem ... or for words tending to scandalise the government, or in abuse of the officers of justice, especially in the execution of their office; also nightwalkers, eavesdroppers, those who keep suspicious company or are reported to be pilferers, those who sleep in the day and wake in the night, common

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2. Coke, 4 Inst.180.

3. Commentaries on the Laws of England (1769), iv. pp.251-253.

drunkards, whore-masters, the putative fathers of bastards, cheats, idle vagabonds, and other persons whose misbehaviour may reasonably bring them within the general words of the statute as persons not of good fame". In 1913 the misreading of the Act which had occurred was pleaded by the defence in Lansbury v. Riley,[4] but to no avail. Two of the judges held that the powers to bind over to be of good behaviour had existed before the 1361 Act and the third held that it was now too late to question the accepted meaning of the statute. The accepted meaning, that persons of "bad fame" could be bound over, seems to date from the publication in 1581 of Lambard's Eirenarcha, a manual for Justices of the Peace, in which the author stated his view that justices were empowered to "punish all them who have offended against the peace, rioters and barators, and also to provide that others do not likewise offend".

2.3 In general terms the modern power to bind over to keep the peace is a power in Justices of the Peace to require any person before the court to enter into a recognisance (i.e. to give a bond), with or without sureties, that for a specified period he will keep the peace and/or be of good behaviour and, if he does not consent so to enter, to commit him to prison forthwith. If he enters into a recognisance, but does not keep the peace or fails to be of good behaviour during the specified period, the sum of money specified in the recognisance or, at the discretion of the court, a lesser sum, may be estreated (i.e. forfeited). It is important to appreciate that while custody is available as a sanction for refusal to be bound over, it is not available as a penalty for breach of the recognisance.[5] The power to bind over to keep the peace is now exercisable in different ways, having different origins. The law is

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4. [1914] 3 K.B. 229.

5. Finch (1962) 47 Cr App. R. 58.

complex and, in a number of respects, uncertain. It may be described as follows.

When may binding over be used?

(a) The forthwith procedure, or where the court binds over "of its own motion"

2.4 This is a personal power in the Justices of the Peace deriving from the Justices of the Peace Act 1361 and the common law. In the Crown Court similar powers are preserved by section 1(7) of the Justices of the Peace Act 1968 (any "court of record having criminal jurisdiction"), section 8 and Schedule 1 of the Courts Act 1971 and sections 8 and 45 of the Supreme Court Act 1981. These powers are also possessed by the Court of Appeal (Criminal Division).[6] Such a bind over may be imposed at any stage of the proceedings upon any of the participants in the proceedings, where a justice considers that the person's conduct is such that there might be a breach of the peace in the future, or where the persons's behaviour was contra bonos mores (contrary to a good way of life).[7] No offence need be proved. It may thus be done before the conclusion of criminal proceedings, on withdrawal of the case by the prosecution, on a decision by the prosecution to offer no evidence, on an adjournment, or upon acquittal of the defendant. It may also be used in the course of proceedings before magistrates, commenced by complaint. The Divisional Court in Veater v. Glennon observed that:[8]

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6. Sharp and Johnson [1957] 1 Q.B. 552; Younis [1965] Crim.L.R. 305.

7. Hughes v. Holley [1987] Crim.L.R. 253.

8. [1981] 1 W.L.R. 567, 574, per Lord Lane C.J.

> "the powers under the Act of 1361 are exercisable by a single justice; and they are exercisable not by reason of any offence having been committed, but as a measure of preventive justice...."

The notion of preventive justice is discussed in some detail, below.

2.5 No distinction need be drawn between powers to bind over to keep the peace under the common law and under the 1361 Act; they appear to be identical in scope. Where binding over is imposed prior to conviction, the justices have no power to add any penalty, which is itself dependent upon conviction, such as a fine[9] or any ancillary order, such as a compensation order.

(b) The procedure on complaint

2.6 Section 115(1) of the Magistrates' Courts Act 1980 provides:

> "The power of the magistrates' court on the complaint of any person to enter into a recognisance, with or without sureties, to keep the peace or be of good behaviour towards the complainant shall be exercised by order on complaint".

The power to make such an order derives historically from the Commission of the Peace and was known as "exhibiting articles of the peace"; it resides in the court rather than in the individual justices. Section 25 of the Summary Jurisdiction Act 1879 codified this power and it has been restated, with some minor changes, in section 91 of the Magistrates' Courts Act 1952 and, in turn, in section 115 of the 1980 Act. At one time it was thought that section 25 of the 1879 Act had restated the entire law on binding over to keep the peace but it soon became clear that the section

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9. Davies v. Griffiths [1937] 2 All E.R. 671.

was limited to the procedure on complaint and that the powers at common law and under the 1361 Act survived it.[10] The order, in contrast to an order under the forthwith powers, may only be made at the conclusion of the proceedings, and should be strictly proved by the hearing of sworn evidence (see, further, paragraph 3.10. below).

2.7 The complaint may be brought by an individual citizen, whereupon the court may issue a summons directed to the person named in the complaint, requiring him to appear and answer to the complaint, or it may be brought by a police officer. The jurisdiction of a magistrates' court to hear complaints and the procedure to be followed is set out in sections 51 to 57 of the Magistrates' Courts Act 1980 and, of course, technically forms part of the magistrates' civil rather than criminal jurisdiction. On the face of it, the wording of section 115(1) suggests that an order may only be made with respect to the complainant, and not imposed as a general requirement upon the person bound over. Since, however, in many of these proceedings the nominal complainant is a police officer who has no personal interest in the matter, it seems that the sub-section should be read as having two separate limbs: (i) as an order to keep the peace generally and/or (ii) to be of good behaviour towards the (actual) complainant.[11]

(c) On arrest for breach of the peace

2.8 Although breach of the peace as such is not an offence known to English law,[12] under common law powers a

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10. See Williams, "Preventive Justice and the Rule of Law", (1953) 16 M.L.R. 417.

11. See (1985) 149 J.P.N. 800.

12. R v. The County of London Quarter Sessions Appeals Committee, ex parte Metropolitan Police Commissioner [1948] K.B. 670, per Lord Goddard C.J.

person may be arrested without warrant for causing a breach of the peace, or earlier, where it is reasonably apprehended that a breach of the peace is likely to be occasioned by him.[13] Such a person may be charged with an offence but, if not so charged, he may instead be brought before the justices to be bound over to keep the peace under their powers at common law or under the Justices of the Peace Act 1361.

2.9 Powers of arrest have been reformed and codified in the Police and Criminal Evidence Act 1984, but section 25(6) of the Act specifically preserves "any power of arrest conferred apart from this section" which clearly must include arrest for breach of the peace. Section 24 of the Act sets out powers of arrest without warrant for arrestable offences and section 25 provides a number of general arrest conditions whereby an arrest without warrant may be made notwithstanding that the offence itself is not an arrestable one. Professor Leigh suggests that powers of arrest for breach of the peace are now "in eclipse", since:[14]

> "in all situations where a constable might desire to use the [common law] power, a power of arrest under either section 24 or section 25 of the Police and Criminal Evidence Act 1984 will apply".

This is not clearly so, however, for the power to arrest for breach of the peace will still be available in respect of conduct which does not appear to the police officer to amount to the commission of any substantive offence, and it remains to be seen how far the common law powers will be used by the police in such cases.

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13. Albert v. Lavin [1982] A.C. 546, 565, per Lord Diplock.

14. Leigh, Police Powers in England and Wales (2nd ed., 1985), p.184.

(d) Common assault

2.10 A particular statutory power to bind over to keep the peace is granted to courts of summary jurisdiction by section 39(3) of the Criminal Justice Act 1925 in the case of persons convicted of common assault under section 42, or aggravated assault on a female or a boy under fourteen under section 43 of the Offences Against the Person Act 1861. It is specifically provided that a bind over to keep the peace under section 39(3) may be imposed in addition to other penalties. It appears that (a) and (b) above already provide magistrates with equivalent or wider powers in these areas, and section 39(3) raises no question of principle which is not already raised by them. Sections 42 and 43 of the 1861 Act and section 39 of the 1925 Act are to be repealed by the new Criminal Justice Bill 1987 reintroduced after the general election in June.

2.11 In addition to these various powers, there are other powers which shelter under the general umbrella of "binding over", but which are in principle quite distinct from binding over to keep the peace. They are:

(e) Binding over to come up for judgment

2.12 This is a common law power[15] which can only be exercised by the Crown Court. Its existence is recognised in section 1(7) of the Powers of Criminal Courts Act 1973 and in section 79(2)(b) of the Supreme Court Act 1981. The effect of such an order, which is exercisable only after conviction, is that a defendant is bound over on specified conditions under which, if he breaks one of the conditions, he will be brought back before the court for sentence but, if he does not break any of the conditions during the specified period, he will never have to be sentenced for the

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15. See Spratling [1911] 1 K.B. 77, 81, per Pickford J.

offence. The order is a "sentence" of the court made on conviction for the purposes of an appeal against sentence to the Court of Appeal.[16]

2.13 The imposition of conditions is characteristic of this form of binding over, and this distinguishes it from binding over to keep the peace, where no conditions additional to the exhortation to keep the peace and/or be of good behaviour may be required. Although a bind over to keep the peace may name a person or persons for whose special protection it is made,[17] no specific condition may be imposed. A condition forbidding the possession, carrying or use of a firearm has been held to be invalid,[18] as has a condition that the person bound over keep away from a specified nightclub for 12 months,[19] and a condition that the person bound over did not teach or try to teach anyone under the age of eighteen for three years.[20] Similarly, conditions requiring those bound over not to attend football matches must be ineffective in law.[21]

2.14 Clearly the only similarity between binding over to come up for judgment and the powers to bind over to keep the peace is one of nomenclature and, accordingly, the former falls outside the Commission's terms of reference. It is referred to again briefly, in the discussion of binding over as a sentencing option, below.

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16. Williams (1982) 4 Cr.App.R.(S.) 239. Compare Hodges (1967) 51 Cr.App.R. 361.

17. E.g. Wilson v. Skeock (1949) 65 T.L.R. 418.

18. Goodlad v. Chief Constable of South Yorkshire [1979] Crim.L.R. 51; see also Ayu [1958] 1 W.L.R. 1264 and cases cited therein.

19. Lister v. Morgan [1978] Crim.L.R. 292.

20. Randall [1987] Crim.L.R. 254.

21. See Cross and Ashworth, The English Sentencing System (3rd ed., 1981), p.14.

(f) Children and young persons

2.15 Particular statutory powers to bind over have been created under the Children and Young Persons Act 1969. Section 1(3) sets out the various orders which may be made in respect of a child or young person brought before a juvenile court in care proceedings. Under section 1(3)(a) the court may make an order requiring his parent or guardian to enter into a recognisance to take proper care of him and exercise proper control of him. The consent of the parent or guardian is required. The statute provides that the amount of the recognisance shall not exceed £1000 and the period shall not exceed 3 years or until the juvenile attains the age of 18 years, whichever period is the shorter. As an alternative to such an order, section 3(7) provides that a young person may be bound over to keep the peace or to be of good behaviour, but this option is limited to care proceedings in cases where the young person is guilty of an offence and consents to the making of the order. These relatively recent powers can be seen as distinct from more general powers to bind over to keep the peace. Specific conditions may be imposed when binding over under the 1969 Act.

2.16 These matters are currently under review and it is possible that the power of courts to impose such orders in care proceedings may be abolished.[22]

(g) Preserving order in court

2.17 There is a common law power in magistrates' courts to bind over for the purpose of preserving order in

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22. See Review of Child Care Law : A Report to Ministers of an Interdepartmental Working Party (September 1985), para. 19.3.

court.[23] Prior to the Contempt of Court Act 1981, such an order was the only one available to magistrates in respect of disorderly behaviour in court other than another common law power to order a person interrupting or hindering proceedings to leave the court. Section 12(1) of the 1981 Act is widely drafted, giving a magistrates' court jurisdiction to deal with anyone who "wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or wilfully interrupts the proceedings of the court or otherwise misbehaves in court". Under subsection 2 any such person may be detained in custody until the court rises, and the court may commit him to custody for up to one month or impose a fine on level 4 of the standard scale. The circumstances in which a bind over might be imposed where the Act would not apply are uncertain but clearly rare; in view of the overhaul of this area of the law culminating in the 1981 Act, the continuance of a widely overlapping common law power of uncertain ambit seems difficult to defend.

(h) Pending hearing of a charge

2.18 There is power, deriving from the common law and the 1361 Act, to bind over pending the hearing of a charge or when a case is adjourned, provided that there is material before the court giving sufficient ground for the making of an order, such as a risk of a breach of the peace in the future.[24] In most such cases the usual course would be the grant of bail subject to any requirements imposed under section 3(6) of the Bail Act 1976, with the sanction

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23. See Zellick, "The criminal trial and the disruptive defendant", (1980) 43 M.L.R. 121, 129, citing cases the earliest of which is dated 1587.

24. R v. Aubrey-Fletcher, ex parte Thompson [1969] 1 W.L.R. 872.

of imprisonment under section 6 of the Act for absconding or of remand in custody under section 7 for breach of a condition of bail. Occasionally, however, a binding over order is imposed to achieve a similar effect, and some instances of this came to light during the miners' strike in 1984. In one case discussed in the press the Crown Court on appeal affirmed the binding over order[25] but in another the order was quashed on the basis that the magistrates had insufficient evidence so to proceed.[26] In a submission to the Law Commission, the Justices' Clerks' Society stated their belief that a short term binding over order may be more effective in such circumstances than bail requirements.[27] It seems anomalous, however, to retain the apparatus of recognisances for this very limited purpose when these were abolished for bail generally by the Bail Act 1976, on evidence that recognisances were an ineffective sanction. In the light of this, it seems difficult to defend the continuing availability of powers to bind over pending hearing of a charge.

Who may be bound over?

2.19 If we turn our attention to categories (a) to (d) above, which taken together seem to compose the core of powers to bind over to keep the peace, the next question is: who may be bound over?

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25. See The Times, 6 August 1984 (letters column).

26. Brooks and Breen v. Nottinghamshire Police [1984] Crim.L.R. 677.

27. A recognisance to keep the peace cannot be imposed as a condition of bail; Bail Act 1976, s.3(6) and see (1983) 147 J.P.N. 625.

(a) A convicted defendant

2.20 A convicted defendant may be bound over to keep the peace. There is an apparent conflict in some authoritative works on sentencing on the question whether a bind over imposed on a convicted defendant can be the sole order imposed by the court, or whether some additional penalty, even if nominal, must be imposed. One view is that the only circumstance in which a bind over to keep the peace may be used standing alone is where it is imposed before conviction. Thus when used at the sentencing stage, the bind over must accompany some other sentencing measure. This applies to both magistrates' courts and the Crown Court. The position seems to be as follows. Section 7(4) of the Criminal Law Act 1967 was derived from Clause 7(4) of the draft Bill attached to the Seventh Report of the Criminal Law Revision Committee on Felonies and Misdemeanours.[28] The purpose of the clause was said in paragraph 75 of the Report to be:

> "... to remove a minor anomaly that in some cases the power to bind an offender over to keep the peace or be of good behaviour apparently cannot be exercised without fining him also".

It was thought by the Committee that where statutes, including the Offences Against the Person Act 1861, section 71, referred to the courts' power to "fine the offender and require him to enter into his own recognisances for keeping the peace", this required the court to do both whenever it wished to do the latter. Section 7(4) was, however, repealed by the Justices of the Peace Act 1968, Schedule 5, which also repealed similar provisions in five other statutes. Support for the view that the effect of this was to deprive courts of the power to order binding over standing alone on sentence can be derived from a number of

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28. (1966) Cmnd. 2659.

sources. First, it is the view of the law adopted in Stone's Justices' Manual.[29] Second, it is clear that the law in Northern Ireland allows binding over to stand alone on sentence in a magistrates' court, arguably since the provision equivalent to section 7(4) has not been repealed.[30] Third, the wording of section 1(7) of the 1968 Act expresses the courts' power to bind over to keep the peace as being "ancillary" to its criminal jurisdiction. This may be taken to mean that after conviction a court should determine sentence before the ancillary power of binding over to keep the peace is considered. The position may thus be regarded as similar to the relation between the fine and the compensation order which existed prior to legislative change in section 67 of the Criminal Justice Act 1982. If this view of the courts' powers is correct, the statement in Archbold[31] that: "It is clear too that ...[a bind over] order may be made either instead of or in addition to any other sentence" is incorrect, even if confined to the Crown Court, since there seems to be no basis upon which Crown Court powers to bind over may be distinguished from magistrates' courts powers in this respect. A similar comment is made by Thomas[32] that "a person who has been convicted of an offence may be bound over to keep the peace in addition to and in lieu of any other sentence" and this view is also adopted by other writers. Their conclusion would seem to be supportable only if the view taken by the Criminal Law Revision Committee of the meaning of the provision in the Offences

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29. (119th ed., 1987), p.480, para. 3-131A.

30. Justices of the Peace Act 1968, s.8(2); Criminal Law Act (Northern Ireland) 1967, s.7(5); Magistrates' Courts (Northern Ireland) Order 1981, s.127; see Boyle and Allen, Sentencing Law and Practice in Northern Ireland (1983), p.10.

31. Archbold, Criminal Pleading, Evidence and Practice (42nd ed., 1985), para. 5-116.

32. Thomas, Principles of Sentencing (2nd ed., 1979), p.229.

Against the Person Act was incorrect. If so, section 7(4) changed nothing, and neither did its repeal. The courts always had the power to impose a bind over standing alone on sentence, notwithstanding the wording of the Offences Against the Person Act, and this was unaffected by the legislative changes. Whatever the legal position, however, the research survey undertaken on behalf of the Law Commission indicates that magistrates' courts do on occasion bind over on conviction without imposing any additional sentence.

(b) An acquitted defendant

2.21 An acquitted defendant may be bound over to keep the peace. It seems that this aspect of the power has long been recognised though specific early authority is difficult to unearth. An acquitted defendant was bound over to keep the peace in Wilson v. Skeock in 1949,[33] and the Court of Appeal has confirmed the position in more recent cases.[34] Available figures suggest that where the Crown Court uses its powers to bind over to keep the peace, about 50% of the cases involve acquitted defendants.

(c) A defendant bound over prior to the conclusion of the proceedings

2.22 As was explained in paragraph 2.4. above, under the 1361 Act and common law powers a defendant may be bound over to keep the peace or to be of good behaviour at any stage before the conclusion of criminal proceedings, on withdrawal of the case by the prosecution, on a decision by the prosecution to offer no evidence, or on an adjournment.

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33. (1949) 65 T.L.R. 418.

34. R v. South West London Magistrates' Court, ex parte Brown [1974] Crim. L.R. 313; R v. Woking Justices, ex parte Gossage [1973] Q.B. 448; R v. Inner London Crown Court, ex parte Benjamin [1987] Crim. L.R. 417.

Powers under section 115 of the Magistrates' Courts Act 1980, on the other hand, can only be exercised against a person once the complaint has been fully heard.

(d) A complainant or witness

2.23 A complainant or witness to the proceedings may be bound over to keep the peace where their conduct justifies the use of the power.[35] It is clear that there has long been power to bind over a complainant. Dalton,[36] writing in about 1610, says:

> "If one hath received a wound, the J.P. may take surety of the peace of the one and of the other (by his discretion) until the wound be cured and the malice be over. Popham, Lord Chief Justice of England (an honourable and grave judge) did accordingly between James and Benton, at Cambridge Assizes ...[1605-6]".

A more fully reported case of the binding over of a complainant is Wilkins[37] in 1907. It is difficult to find ancient authority for the binding over of witnesses but in the modern case of Sheldon v. Bromfield Justices[38] it was said that it is "well known"[39] that justices have power pursuant to their commissions or pursuant to the 1361 Act to bind over all persons before them. It has since been held, however, that in the Crown Court the victim of an assault under section 20 of the Offences Against the Person Act 1861 who was not a party to the proceedings and had not been called to give evidence against his assailant, who pleaded

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35. R v. Hendon Justices, ex parte Gorchein [1973] 1 W.L.R. 1502.

36. Dalton, The Country Justice (1727 ed.), p.380.

37. [1907] 2 K.B. 380.

38. [1964] 2 Q.B. 573.

39. Ibid., at p. 577.

guilty, could not be bound over in law[40] nor could a person who was the subject of an unconditional witness order, who had presented himself at the courthouse but had not been required to give evidence.[41] This was because they were not persons "who or whose case is before the court" (section 1(7) Justices of the Peace Act 1968). In Ex parte Pawittar Singh Stephen Brown L.J., in the Divisional Court, commented that binding over a witness was "a serious step to take" and that its occurrence should be "exceedingly rare".[42]

(e) Juveniles

2.24 The position in relation to juveniles is more complex. Since a refusal to consent to be bound over is punishable with imprisonment, it would seem at first sight that a person who is below the age at which a sentence of imprisonment may lawfully be imposed cannot be bound over without consent. This view was taken by the Divisional Court in Veater v. Glennon,[43] but in Howley v. Oxford,[44] decided after the Criminal Justice Act 1982 had raised the age limit for prison sentences, in general, to twenty-one, it was held that a magistrates' court could bind over to keep the peace a person aged 17-21 without his consent. Subject to section 1(5) of the Act the court may commit a young person to prison under section 9(1)(c) for "contempt of court or any kindred offence". It was held that the defendant's refusal to be bound over, twice, in the face of the court, amounted to a "kindred offence". Where the

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40. R v. Swindon Crown Court, ex parte Pawittar Singh [1984] 1 W.L.R. 449.

41. R v. Kingston Crown Court, ex parte Guarino [1986] Crim.L.R. 325.

42. R v. Swindon Crown Court, ex parte Pawittar Singh [1984] 1 W.L.R. 449, 451.

43. [1981] 1 W.L.R. 567.

44. Howley v. Oxford (1985) 81 Cr. App. R. 246.

defendant consents to be bound over, there appears to be no lower age limit in law because no question of imprisonment arises. The remedy for breach of the bind over is to estreat the recognisance, in whole or in part.

2.25 It will be seen that the origin and scope of the several different powers to bind over to keep the peace leads to a situation of considerable complexity. It is difficult to state the law with any great degree of certainty. At the very least, there would seem to be a case for tidying up and restating these powers in a simpler, more certain and more accessible form.

(3) PRACTICE AND PROCEDURE

3.1 Several of the procedural aspects of binding over to keep the peace are idiosyncratic and, in some places, vague and rather uncertain. Whilst the main emphasis of this Working Paper is on the presentation of the issues of principle in relation to binding over, the complexity of the existing law as described in this chapter must also be appreciated in the course of reaching a view on reform.

3.2 The binding over order may require the person concerned to keep the peace or to be of good behaviour, or both. It seems that binding over to keep the peace may be ordered whenever the justices apprehend that, having regard to the conduct of the person before the court, there may be a breach of the peace committed by him in the future, or behaviour by him likely to bring about a breach of the peace committed by others.[1] A difficulty here is the continuing uncertainty over the precise meaning of "breach of the peace" in English law. It appears that conduct which is annoying, but which neither involves menace, violence, the threat of violence or any element of incitement to violence does not constitute a breach of the peace.[2] Binding over to be of good behaviour, however, may be ordered where there may be no such apprehension but where, for example, it is thought that the person may otherwise continue to behave unlawfully[3] or, more vaguely, continue to create annoyance

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1. R v. Aubrey-Fletcher, ex parte Thompson [1969] 1 W.L.R. 872; R v. South West London Magistrates' Court, ex parte Brown [1974] Crim.L.R. 313.

2. Howell [1982] Q.B. 416; followed in Parkin v. Norman [1983] Q.B. 92, though see the wider comments, particularly by Lord Denning in R v. Chief Constable of Devon and Cornwall, ex parte Central Electricity Generating Board [1982] Q.B. 458.

3. E.g. R v. Sandbach Justices, ex parte Williams [1935] 2 K.B. 192 (non-violent obstruction of a constable by warning others of his approach); Bamping v. Barnes [1958] Crim.L.R. 186 (persistent contravention of a byelaw about street photography).

or distress to others, and behave in a manner contra bonos mores. In the recent case of Hughes v. Holley[4] it was held that it was appropriate to bind over to be of good behaviour where the defendant's behaviour had been "offensive and contrary to standards of generally accepted decent behaviour". It was for the justices to apply their own standards to decide whether this had been so. The conduct regarded as sufficient to justify binding over is therefore somewhat vague and there is no strict dividing line in the circumstances appropriate for the making of one or other of the orders; indeed on the face of it "good behaviour" clearly must include "keeping the peace". The research survey undertaken by the Law Commission (see chapter 4, below) indicated that a large majority (79%) of binding over orders are made both to keep the peace and be of good behaviour and that, of the remainder, some 12% are to keep the peace and 9% to be of good behaviour. There is no legal requirement that where a bind over is imposed the circumstances of the conduct must have disclosed a tendency to breach the peace though, this will often be the case.

3.3 A distinctive feature of the order to bind over to keep the peace or be of good behaviour is the entry into a recognisance or bond, with the further requirement, if so demanded by the court, of sureties (though this is unusual; no examples were found in the research survey) and a specified period within which the order to keep the peace etc. is to run. The amount of the recognisance has no upper limit in law save that it must be reasonable. It follows that the recognisance may be set at a sum substantially higher than the maximum penalty available to the magistrates by way of fine for the offence.[5] Examples

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4. [1987] Crim.L.R. 253. See Bazell, "Binding over - too wide a power?", (1987) 151 J.P.N. 456.

5. R v. Sandbach Justices, ex parte Williams [1935] 2 K.B. 192.

where this may be used are in the contravention of byelaws, obstruction of the highway and drunkenness offences. This approach may have a salutary effect, but is questionable in principle, since it provides a means for the courts to impose a penalty higher than that specified by Parliament. Further, refusal to be bound over will result in imprisonment which may not have been available as a penalty in respect of the original conduct. The survey indicated a nationwide average of about £100 recognisance but the average in sample courts varied from under £40 to as much as £200. It is, however, now established that it is a breach of natural justice for a person to be bound over in anything other than a trivial sum without examining his means and allowing him to make representations.[6] The period for which the order may run is again entirely within the discretion of the justices[7] and, nationwide, the survey revealed the average length to be just over 13 months, with the average in sample courts varying between 10 and 21 months. Periods of 6 months and 12 months seem to be the most common.

3.4 Section 115(3) of the Magistrates' Courts Act 1980 provided magistrates' courts with penalties for failure to comply with an order made under section 115 (the procedure on complaint), of up to six months' imprisonment, or until the person concerned "sooner complies with the order". This is limited to binding over under section 115, and there appears to be no limit upon the period of custody which may

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6. R v. Central Criminal Court, ex parte Boulding [1984] Q.B. 813.

7. Said to have been the case at least since Willes v. Bridger (1819) 2 B & Ald 278; 106 E.R. 368. In Northern Ireland the maximum period is 2 years: Magistrates' Courts (Northern Ireland) Order 1980, Art. 127(2).

be imposed in the case of failure to comply with other bind overs, such as under the forthwith powers.[8]

3.5 The 1980 Act provides by section 120(1) that in the case of the breach of an order, the court may order forfeiture of the whole or part of the recognisance, together with costs. It seems that this is also the case in respect of breach of a bind over imposed under the 1361 Act.[9] Under section 120(2), there is the important provision that a recognisance can only be declared to be forfeit by way of an order on complaint; the court cannot deal with it of its own motion. This is not just confined to cases where the bind over was imposed after complaint, but applies equally to bind overs made under the 1361 Act. Proceedings for forfeiture are civil in character[10] and thus require only the civil standard of proof.[11] Under section 120(1), only the magistrates' court which made the order can order the recognisance to be forfeited. Thus a court dealing with the defendant may note the existence of a recent bind over on his record, but is empowered to take no action in respect of it other than to notify the court which originally made that order. There is no power equivalent to that under section 8 of the Powers of Criminal Courts Act 1973, whereby a magistrates' court which convicts the

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8. Section 31 of the Magistrates' Courts Act 1980 (limitation on powers of magistrates' courts to impose imprisonment) does not apply where no offence has been committed.

9. In Randall [1987] Crim.L.R. 254, half of the recognisance imposed, apparently under the 1361 Act, was forfeited. This matter was not, however, in issue on appeal.

10. R v. Southampton Justices, ex parte Green [1976] Q.B. 11.

11. R v. Marlow Justices, ex parte O'Sullivan [1984] Q.B. 381. In contrast, proceedings to determine whether there has been a breach of a bind over to come up for judgment are subject to the criminal standard of proof: R v. McGarry (1945) L.T. 72, as explained by Marlow Justices.

defendant during the currency of a probation order or conditional discharge imposed by a different magistrates' court may deal with it together with the current offence. In consequence it seems that quite often no action will be taken on the breach of a bind over. The point has been made to us, however, that not all courts accept this view of the law, and some deal with recognisances imposed by other courts. Section 116 of the Act does provide a very limited exception whereby one court may forfeit a recognisance imposed by another, if a surety applies, on the ground that the person bound is, or is about to be, in breach of the conditions of the recognisance. In the event of failure to pay the sum specified in respect of the breach, section 120(4) provides that payment may be enforced as if it were a fine. By section 76 and Schedule 4 there is a maximum period of imprisonment in default ranging from 7 days to 12 months according to the sum that is due.

3.6 Under section 1 of the Magistrates' Courts (Appeals from Binding Over Orders) Act 1956, there is a right of appeal to the Crown Court against an order by a magistrates' court to enter into recognisances to keep the peace or be of good behaviour. Appeals to the Crown Court are by way of rehearing.[12] The 1956 Act appears to work well enough where it is the defendant who has been bound over, but the absence of prescribed procedures to cater for the binding over of other persons creates difficulties in some cases. There is a lack of established procedures for putting information before the Crown Court as to considerations which were important in the magistrates' assessment. In particular, section 1(2)(a) of the Act provides that the "other party" to the proceedings in which the order was made shall be the respondent to the appeal. But where the order is made in respect of a prosecutor or witness, the other party (the defendant) has no interest in the appeal, and is

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12. Shaw v. Hamilton [1982] 1 W.L.R. 1308.

highly unlikely to attend the Crown Court to support an order which he or she did not ask the magistrates to make. It seems that in the past some Crown Court judges have been prepared to take account of a statement of what happened before the magistrates, even without the magistrates being represented, provided all parties have seen and considered that statement, but other judges have not been prepared to accept this. Must, then, the magistrates appear in person to support the making of their order? The position has to some extent been clarified by the decision in R v. Preston Crown Court, ex parte Pamplin,[13] which stated that the function of the justices is limited to appearing and assisting the court and in effect "to do the things which an amicus curiae could do if he appeared before the court", stating the surrounding circumstances in so far as they are not in dispute. According to Donaldson L.J. in that case, however:

> "...[the justices] cannot be cross-examined as to any disputed matters of fact. In this case,...the Crown Court was placed in a very difficult situation indeed in that there was no-one appearing before them who could put contested facts before them. It may very well be that in those circumstances they should have allowed the appeal...."

The consequence may be that if, on an appeal by a prosecutor who has been bound over, the original defendant does not appear in order to put contested facts before the court, the Crown Court will be obliged to allow the appeal, even though the making of the order was quite justified. Lack of enthusiasm on the part of parties being required to argue an appeal surely does not make for properly conducted proceedings.

3.7 Apart from the right of appeal, a person bound over by magistrates may be able to make an application to the

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13. [1981] Crim.L.R. 338.

Divisional Court, by way of case stated or judicial review, where it is suggested that magistrates have misapplied the law to the facts of the case or have exceeded their jurisdiction. The Divisional Court has a similar jurisdiction to hear applications from the Crown Court, where the relevant decision was not one "affecting the conduct of a trial on indictment",[14] and it has recently been held[15] that the binding over of an acquitted defendant by a Crown Court judge was not such a matter. An application for judicial review cannot be entertained until any available appeal procedure has been exhausted.

3.8 There is no right of appeal to the Crown Court against the estreatment of the whole or part of a recognisance.[16] Even so, the person should be told the nature of the breach alleged against him and be asked whether he desires to give evidence, call witnesses or give any explanation.[17] An aggrieved person could apply to the Divisional Court for an order of certiorari.

3.9 There is no appeal against the bind over of a parent under the Children and Young Persons Act 1969, section 7(7). Proceedings to forfeit a recognisance proceed by way of order on complaint, and may result in forfeiture of the whole or part of the recognisance, together with costs.

3.10 The wide powers which justices of the peace have to bind over defendants, whether found guilty or not, complainants or witnesses at whatever stage of the

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14. Supreme Court Act 1981, s.29.

15. R v. Inner London Crown Court, ex parte Benjamin [1987] Crim. L. R. 417.

16. R v. Durham Justices, ex parte Laurent [1945] K.B. 33.

17. R v. McGregor [1945] 2 All E.R. 180.

proceedings, have already been described. With the exception of the procedure initiated by complaint under the Magistrates' Courts Act 1980, there is little in the way of any prescribed procedure for enabling a person to be heard before the bind over is made. The authorities indicate that there is no general obligation upon the court to provide such an opportunity,[18] though it may be good practice to do so. It is now the law that facts have to be established before the justices which could justify them in exercising their power to bind over,[19] that this should be done by admissible evidence,[20] and that the person should be given a reasonable opportunity of knowing the justices' intentions and being able to make reply.[21] On the other hand, an order under the 1361 Act or at common law may be made without proof beyond reasonable doubt of the conduct alleged. It has been said that "there need not be proof of the matters complained of, but nevertheless the order cannot be made capriciously".[22] Unless it imposes a recognisance in a trivial sum, the court should give the defendant an opportunity of making representations and providing

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18. R v. Woking Justices, ex parte Gossage [1973] Q.B. 448.

19. R v. Wilkins [1907] 2 K.B. 380; R v. Aubrey-Fletcher, ex parte Thompson [1969] 1 W.L.R. 872; R v. Swindon Crown Court, ex parte Pawittar Singh [1984] 1 W.L.R. 449, 451 per Stephen Brown L.J.: "[Binding over] is a serious step to take and should only be taken where facts are proved by evidence before the court which indicate the likelihood that the peace will not be kept".

20. Brooks and Breen v. Nottinghamshire Police [1984] Crim.L.R. 677 (Crown Court).

21. Sheldon v. Bromfield Justices [1964] 2 Q.B. 573; R v. Keighley Justices, ex parte Stoyles [1976] Crim.L.R. 573; Shaw v. Hamilton [1982] 1 W.L.R. 1308. The same principles apply equally to witnesses and complainants: R v. Hendon Justices, ex parte Gorchein [1973] 1 W.L.R. 1502.

22. R v. Aubrey-Fletcher, ex parte Thompson [1969] 1 W.L.R. 872, 874, per Edmund Davies L.J.

information about his means.[23] In the case of a disturbance in the face of the court, it has been held that natural justice does not require that the person be given a warning or a chance to make representations before being bound over.[24]

3.11 It is unclear whether a bind over to keep the peace should be listed in the person's antecedents.[25] Section 7(5) of the Rehabilitation of Offenders Act 1974 excludes from antecedents any order of a court "with respect to any person otherwise than on a conviction". The operation of this section might seem to require a distinction between bind overs imposed prior to conviction under the 1361 Act and common law powers and bind overs imposed as part of sentence. Such a distinction does not appear to be drawn in practice. The research survey found that the procedure for recording bind overs is patchy. Some courts keep a recognisance book while others note bind overs in the court records. There is no uniformity in notification of bind overs to the police on the making of an order and no uniformity in police practice in listing bind overs in the antecedents. It seems that details of at least some bind overs are held on the Police National Computer.[26]

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23. R v. Central Criminal Court, ex parte Boulding [1984] Q.B. 813.

24. R v. North London Metropolitan Magistrate, ex parte Haywood [1973] 1 W.L.R. 965.

25. Compare R v. London Sessions, ex parte Beaumont [1951] 1 K.B. 557 and R v. Abrahams (1953) 36 Cr.App.R. 147.

26. The Observer, 23 March 1980 (news item),cited in Hewitt, The Abuse of Power (1982), p.125.

(4) STATISTICAL SURVEY

4.1 Some indication of the statistical importance of binding over to keep the peace is provided by a research study undertaken on behalf of the Law Commission. To the Commission's knowledge, this is the only substantial modern study of this kind. Whilst it furnishes some useful information, it must be conceded that the figures are now four years old, and relate to a period prior to the introduction of two important reforms which are likely to have had some impact upon the extent of use of binding over: the introduction of the Crown Prosecution Service and the coming into force of the Public Order Act 1986. Because of the paucity of other information available on binding over, however, it is worthwhile summarising the main findings of the research study here.

4.2 Questionnaires were sent to all magistrates' courts in England and Wales, to be completed during October 1983, on each occasion when an order of binding over to keep the peace was made in that month. 585 courts responded, 94% of the total. A total of 2830 cases of binding over orders were recorded in October 1983. Extrapolating from that figure, and bearing in mind that this can only be a fairly crude estimate, it appears that the number of binding over orders made annually in magistrates' courts in England and Wales is of the order of 34,000.

4.3 The proportion of cases in which the bind over was used after conviction, as part of sentence, was some 27% of the total number of bind overs; this would produce a figure of just over 9000 binding over orders imposed at that stage. Based on figures in the Criminal Statistics for England and Wales for 1983, the year of the survey, this would compare with a total of 32,700 probation orders, 26,900 community service orders and 76,500 orders of conditional discharge made by magistrates' courts in that year. In the other 73% of the cases, the bind over was ordered after the plea but

before the hearing of a criminal charge, on withdrawal of the information or dismissal of the complaint, or on an adjournment, and the remainder on acquittal or as the outcome of a complaint. The use of binding over in an estimated 25,000 such cases a year is very much more extensive than that which is suggested by the Criminal Statistics. In 1973, the last year in which non-sentence bind overs were recorded in the Statistics, a figure of 10,000 was given, four-fifths of which arose in proceedings initiated by complaint and one fifth in criminal proceedings where no conviction was recorded.[1] The disparity between these figures and the survey's findings suggest either (i) a dramatic change in use by the courts of their powers to bind over, between 1973 and 1983, (ii) a substantial over-estimate from the survey or (iii) substantial under-recording of bind overs in the Criminal Statistics. A combination of (ii) and (iii) seems the most likely explanation. There is no reason to think that October 1983 was an atypical month, though a later smaller survey (see below) did suggest a slightly lower incidence of binding over, and there is reason to think that bind overs are under-represented in the Criminal Statistics (see paragraph 3.11, above).

4.4 A striking fact was that of the 585 courts which responded, 228 (39%) did not use binding over to keep the peace at all during the relevant period. Of the total orders imposed, 85% resulted from proceedings instituted by the police, the majority of these by way of charge, summons, or complaint under section 115 of the Magistrates' Courts

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1. Criminal Statistics for England and Wales for 1973, Cmnd. 5677, p.217. The Supplementary Tables to the Criminal Statistics provide some further information on the number of persons from whom recognisances were taken after conviction by a criminal court. The use of the bind over at an earlier stage of proceedings, or on acquittal, is not therefore included.

Act 1980 and some 12% by way of arrest for breach of the peace. Only 3% arose from actions initiated by private individuals. Of the total bound over, 96% were defendants, while of the remainder 2% were witnesses and 2% were complainants. 42% of bind overs were imposed on persons under 21 years of age. 79% of the binding over orders were both to keep the peace and be of good behaviour. Of the remainder, some 12% were to keep the peace and 9% were to be of good behaviour. The survey indicated an average level for the recognisances required of about £100, but the average in sample courts varied from under £40 to as much as £200. There were no examples recorded of the court requiring sureties. The average length for which the order was to run was just over 13 months, with the average in sample courts varying between 10 and 21 months. If there is a "standard case" of binding over which emerges from this survey, it is that of an uncomplaining adult defendant bound over at a stage prior to sentence, both to keep the peace and be of good behaviour, in the sum of £100, as a result of proceedings initiated by the police.

4.5 A further questionnaire was sent to a sample of 60 of the original courts, to be completed during March 1984. Of the new sample, 57 responded, 5 of which did not use the bind over at all during March. The overall use of the bind over in the courts did seem significantly lower in this second survey, but the comparative use made of the measure by individual courts between the two surveys was quite consistent. 49 of the 57 courts used binding over on 20 or fewer occasions during March 1984. One court, however, used it on over 100 occasions. Interestingly this court, which also produced substantially the highest return on the first survey, used binding over only once as a measure at the sentencing stage. The return for another court in the second survey showed that it had used binding over on only eight occasions, but each time as part of sentence. Further details were obtained in this survey about obtaining consent to be bound over. It was found, not surprisingly

perhaps, that this caused no difficulty to the court in 97% of the cases. In the exceptional cases, one defendant refused to be bound over and when the complaint was heard the case was dismissed. In another the defendant consented only after the complainant agreed to be bound over as well. In a third case the court ordered imprisonment for one month. The picture which emerges from the two surveys is one of considerable variation, both in the extent of use of binding over in magistrates' courts and in the way in which the usefulness of the measure itself is perceived by individual courts.

4.6 Evidence of the comparative rate of use by the Crown Court of binding over to keep the peace is not very readily available. From figures supplied to us by the Home Office relating to bind overs made in the Crown Courts in 1980, it seems that only 565 such orders were made that year, 110 as part of sentence and the remainder at an earlier stage or on acquittal of the defendant. There was enormous variation amongst different areas of the country. A comparison of rate of use amongst courts in different police force areas indicates that courts in 12 of the 43 areas did not use the bind over at all during that year, but that two areas (Merseyside and Metropolitan) accounted for almost exactly one-third of the total bind overs. To some extent, it seems that the bind over was used more extensively in the large cities, but on the other hand there was a nil return for Crown Courts in the West Midlands. As with the magistrates' courts, then, the picture is one of great variation.

4.7 In the second survey, information was gathered about forfeiture of recognisances as a result of breach of bind over. Of the 57 courts which responded, 37 reported no breach proceedings in that month. The remaining courts reported a total of 33 cases. On the face of it, this is a very low rate of breach. It seems likely, however, that this figure under-represents the frequency of actual

breaches, because of inconsistency in recording bind overs, failure to notify courts of breach and the various problems of enforcement referred to in paragraph 3.5 above. The average level of recognisance in the 33 cases was £115.45 and the average period of the order was 18 months. 23 of the cases involved bind over to keep the peace and be of good behaviour, 9 involved only the former and 1 only the latter. In 31 cases the breach was admitted, in 27 cases only police evidence was heard and in 28 cases no evidence was given by the defendant. The action taken by the court dealing with the breach was in 11 cases to require forfeiture of the recognisance and in 22 cases to require forfeiture in part. In 11 of the cases a further binding over was made for, on average, a slightly longer period and in a slightly higher sum than before.

(5) CASES DEALT WITH BY WAY OF BINDING OVER

5.1 A number of attempts have been made in Parliament over the years to abolish or restrict the powers to bind over to keep the peace. The most recent was in 1978 when the House of Commons refused, by 117 votes to 94, leave to introduce a Justices of the Peace Act 1361 (Amendment) Bill which was intended to limit the power under the 1361 Act to cases where the person was charged with an offence.[1] The power gives rise to controversy on occasions when it is used by the courts in response to the activities of groups or individuals achieving some social or political notoriety. In the last few years such instances have included the binding over of prosecution witnesses at the trial of hunt saboteurs,[2] onlookers at anti-racial demonstrations against the National Front, women at Greenham Common, prostitutes, kerb crawlers and picketing miners.[3] Occasionally the facts of a particular case have attracted media interest, such as where one defendant, acquitted by a jury on counts of assault, was required to be bound over in respect of blowing a conch shell in Brixton market.[4] The defendant refused to comply and was committed to prison for seven days. The Divisional Court dismissed an application for judicial review, May L.J. commenting that:[5]

> "there was ample material before the... judge to found his view that a consequent breach of the

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1. Hansard (H.C.), 6 June 1978, vol. 951, cols. 45-52. For a description of earlier attempts see Grunis, "Binding over to keep the peace and be of good behaviour in England and Canada", [1974] Public Law 16, 39.

2. The Times, 4 December 1980.

3. See Brooks and Breen v. Nottinghamshire Police [1984] Crim. L.R. 677.

4. R v. Inner London Crown Court, ex parte Benjamin [1987] Crim. L.R. 417.

5. Court of Appeal Transcript No. CO/846/85, p.8.

> peace was... probable, if the applicant did indulge in future unbridled use of his shell trumpet".

On these occasions, then, the use of the powers has been controversial and has attracted press attention but it is probably true that, as Wilcox says,[6] "the Act, in spite of its antiquity, has been constantly used with remarkably few signs of disapproval". Where criticisms have been made, they have been primarily in the field of public order. Wilcox suggests[7] that while the Act generally serves a useful purpose "in preventing annoyance by cranks and unbalanced eccentrics" it is

> "only when...[it] is used to forbid political activities, especially if the defendants are committed to prison for refusing to be bound over, that the powers given to the justices are challenged."

Others would certainly disagree. Hewitt[8] has characterised binding over to keep the peace as "perhaps the most arbitrary form of judicial interference with the freedom of peaceful assembly", and is able to cite instances of the imprisonment of Bertrand Russell, Pat Arrowsmith and others after their refusal to be bound over following demonstrations. Objection has also been taken to the width and vagueness of magistrates' powers in this area, particularly where the binding over is to be of good behaviour. Professor Glanville Williams, for one, finds it "extraordinary" that magistrates should be able "to indulge their fancy by formulating their own standards of behaviour for those who come before them".[9] On the other hand, the

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6. Wilcox, The Decision to Prosecute (1970), pp. 48-49.

7. Ibid., at p.49.

8. Hewitt, The Abuse of Power (1982), p.125.

9. Williams, Criminal Law: The General Part (2nd ed., 1961), p.719.

Justices' Clerks' Society told us that they were[10]

> "convinced of the contemporary value of the power to bind over and that its repeal would weaken the courts' response to potential trouble."

Binding over has been described as "one of the oldest and most useful powers vested in the office of justice of the peace".[11]

5.2 It is appropriate at this stage to give some clearer indication of the diversity of cases which come before magistrates' courts which are liable ultimately to be dealt with by way of binding over to keep the peace. As part of the research study conducted on behalf of the Commission, the courts were asked to outline the facts of the cases in which a bind over was the eventual outcome. Using these examples, some instances provided by the Justices' Clerks in their submission to us and others taken from reported cases and other sources, a representative picture of the range of use of binding over may be built up. Broadly, cases seem to fall into three main groups. The first relates to the less serious end of the scale of matters involving public disorder, the second covers relatively minor incidents causing annoyance and distress, including certain forms of sexual behaviour in public, and the third relates to neighbour and domestic disputes. The categories overlap and, as we have seen, each may come before the magistrates in a variety of ways: on a prosecution, on arrest for breach of the peace, or on complaint brought by an individual or by a police officer. While most of the examples are apparently of a relatively low degree of seriousness, a few are not and presumably in the cases attracted a bind over rather than a heavier

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10. Justices' Clerks' Society, Power to Bind Over (1981), p.8.

11. Dodds, "The Jurisdiction of Magistrates to Bind Over", (1985) 149 J.P.N. 259.

penalty in the light of the special circumstances of the parties involved. It would probably be a mistake, therefore, to dismiss all these cases as trivial.

(a) Public order cases

(i) disorderly behaviour in a public place (several specified in the research study)

(ii) argument in a D.H.S.S. office over benefit claim (several)

(iii) roadside dispute between drivers after a minor road accident

(iv) rowdy behaviour late at night

(v) dispute between shopkeeper and customer

(vi) dispute between employer and employee

(vii) disorderly behaviour in out-patient ward at hospital

(viii) shouting at passers-by outside a railway station

(ix) climbing on the roof of a bank and shouting at passers-by

(x) causing disturbance by shouting, knocking on doors, etc.

(xi) disturbances following glue sniffing

(xii) wife creating disturbance after husband's arrest

(xiii) drunk and disorderly (several)

(xiv) refusing to leave licensed premises

(xv) using insulting and abusive words (several)

(xvi) minor assault (several)

(xvii) threat to kill

(xviii) groups of youths armed with sticks intent upon assaulting pupils at a neighbouring school[12]

(xix) the persistent holding of meetings likely to cause disorder[13]

(b) Annoyance and distress

(i) peeping Toms (several in the research study)

(ii) looking in the windows of a girls' school

(iii) pestering a female by following or persistent telephoning (several in the research study)

(iv) indecent exposure (several)

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12. Veater v. Glennon [1981] 1 W.L.R. 567.

13. Wise v. Dunning [1902] 1 K.B. 167.

(v) eavesdropping[14]

(vi) sending anonymous or poison pen letters[15]

(vii) kerb-crawling[16]

(viii) threatening suicide by standing on window ledge or jumping in front of cars

(ix) sexual intercourse in the back of a car on a main road at night

(x) two men kissing and fondling each other in a public street[17]

(xi) men going into ladies' lavatories[18]

(xii) transvestism[19]

(xiii) members of protest groups chaining themselves to buildings[20]

(xiv) gesturing with a toy gun from a motor vehicle

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14. R. v. London Quarter Sessions, ex parte Metropolitan Police Commissioner [1948] 1 K.B. 670.

15. Williams, Criminal Law: The General Part (2nd ed., 1961), p.716.

16. Hughes v. Holley [1987] Crim. L.R. 253.

17. Masterson and Cooper v. Holden [1986] 1 W.L.R. 1017.

18. (1949) 13 J.Cr.L. 226.

19. (1951) 15 J.Cr.L. 9.

20. The Times, 23 December 1983.

(xv) street photographer persistently breaching byelaw prohibiting the soliciting of street custom[21]

(xvi) vagrants verbally abusing private individual

(xvii) personal abuse to private individuals (several)

(xviii) threatening and abusive words and behaviour (several)

(xix) blowing on a conch shell[22]

(c) Neighbour and domestic disputes

(i) "domestic" arguments between husband and wife or cohabitees or other family members (many in the research study)

(ii) landlord and tenant disputes[23]

(iii) argument over money allegedly owed

(iv) pestering a female by following or persistent telephoning (several in research study)

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21. Bamping v. Barnes [1958] Crim. L.R. 186.

22. R. v. Inner London Crown Court, ex parte Benjamin [1987] Crim. L. R. 417.

23. See McConville and Baldwin, Courts, Prosecution and Conviction (1981), pp.38-40.

(v) molestation by an estranged spouse, or after a divorce (several)

(vi) arguments between neighbours in a block of flats over cleaning of the stairs

(vii) minor assaults or threats

(viii) intrusive nosiness by a neighbour.[24]

5.3 A perusal of the varied contents of these lists prompts a number of questions central to the issue of law reform in this area. How many of the activities identified here are sufficiently serious to justify the involvement of the criminal law and the bringing of proceedings in overburdened courts? Several of them are already the subject of substantive criminal law (e.g. indecent exposure, assault and, more recently, kerb-crawling). Is it necessary for the machinery of binding over to exist alongside the ordinary options of caution or prosecution for these offences? Some of the other behaviour would probably not constitute a criminal offence (e.g. peeping Tom, eavesdropping, poison-pen letter writing, transvestism, personal abuse). Where is the line to be drawn in our society between the wishes of individuals to express themselves in these ways and the protection of others who find their behaviour distasteful, upsetting or frightening? Is it necessary to bring these cases within the reach of the criminal law? In the past both the eavesdropper and the peeping Tom committed criminal offences; is there a sufficient problem here to justify drafting modern equivalent offences, as there was felt to be in relation to kerb-crawling? A possible definition of a poison-pen letter offence, for instance, was suggested by the

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24. The Times, 7 August 1987 (news item).

Commission only two years ago.[25] Or might it be better to draft a very broad criminal offence to cater for all or a large majority of these categories, such as appears to be the case in Scotland (see chapter 10, below), with their generously defined offence of "breach of the peace"? In respect of some of the activities, such as molestation and pestering of females, might not an extension to existing remedies in the civil law be a more appropriate response?

5.4 These specific cases foreshadow the lines of enquiry in the rest of this Working Paper. The current operation of powers to bind over to keep the peace seem to us to pose several very difficult conflicting arguments of principle and expedience. These arguments are discussed in the next two chapters.

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25. Report on Poison-Pen Letters, (1985) Law Com. No. 147.

PART II : BINDING OVER IN THE COURSE OF PROCEEDINGS

(6) THE ARGUMENTS OF PRINCIPLE

6.1 Of the binding over orders recorded in the research study, three quarters were imposed either at a stage of criminal proceedings prior to conviction or at the conclusion of proceedings commenced by complaint. It is necessary to identify the rationale of binding over powers used in these circumstances.

(a) Powers unconstitutional

6.2 The main objection of principle which has been made to these binding over powers is that they are fundamentally unconstitutional. This may be put in the terms of Dicey's proposition that[1]

> "...no man is punishable or can lawfully be made to suffer in body or in goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land."

In modern times, the decision of the House of Lords in Gouriet v. Union of Post Office Workers[2] endorses the view that, with very limited exceptions, the only proper way of enforcing criminal sanctions is by prosecuting and punishing the offender after he has acted in breach of criminal law provisions. It is therefore said to be unconstitutional, or contrary to the rule of law, that a person not convicted

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1. Dicey, An Introduction to the Study of the Law of the Constitution (10th ed., 1959), Pt. II, p.188. See further Williams, "Preventive Justice and the Rule of Law", (1953) 16 M.L.R. 417, 419-420.

2. [1978] A.C. 435.

of any criminal offence can be required by a court to enter into a formal undertaking, with the sanction of imprisonment on failure to comply. This is particularly so where the proceedings are criminal in nature and the defendant has been acquitted, or there appears to be no substantive criminal offence of which he could have been convicted, but it is also true of the complaint procedure which actually forms part of the magistrates' civil jurisdiction but which certainly has a "quasi-criminal"[3] element to it, in that the complaint is normally issued by a police officer who has no personal concern in the matter of the complaint. Powers analogous to binding over to keep the peace have been attacked on constitutional grounds in the United States (see chapter 10(f) below). It may be replied by the proponents of binding over that the powers are unobjectionable since the person bound over to keep the peace or to be of good behaviour is being asked to do no more than he is ordinarily required to do as a law-abiding citizen. While there is force in this point, there is surely a difference between the ordinary obligations of good citizenship and the required entry into a formal undertaking with the sanction of imprisonment on failure to comply.

(b) Certain aspects objectionable

6.3 Objection in principle may be taken to certain aspects of binding over powers, rather than to their total sphere of operation. A related problem is that these powers are said to be objectionable because of their vagueness and uncertainty of scope. At least the following nine specific complaints may be listed:

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3. See (1982) 146 J.P.N. 196 ("quasi-criminal") and Harrison, "Binding-over: Recent Legal Developments", (1984) 48 J.Cr.L. 290, 292, describing the procedure as "hybrid".

(a) Under these powers a person who has not actually been convicted or, indeed, could not have been convicted, of any criminal offence may be required to enter into a formal undertaking to keep the peace or be of good behaviour, with the sanction of immediate imprisonment on failure to comply (see paragraphs 2.4-2.6, above).

(b) Associated with this, the power may be exercised where the usual burden and standard of proof required in the proceedings has not been discharged (see paragraph 3.10, above).

(c) Whilst a person is invited to "consent" to be bound over, this consent is unrealistic, since failure to comply results in immediate custody. It should be said, however, that this situation is not unique to binding over. Recently it was explained by the Court of Appeal that a defendant's consent to be the subject of a probation order was not vitiated by his knowledge that the only realistic alternative was an immediate custodial sentence.[4] All that was required was that the defendant had a full appreciation of what the realistic alternatives were, and could decide whether or not to consent, having considered them. A separate point in relation to binding over, however, is that at times it may offer an opportunity for publicity to a person who actually seeks imprisonment to gain press attention. This, in turn, may tend to lead the legal system into disrepute.

(d) The availability of binding over offers an opportunity of plea bargaining which could result in some pressure being placed upon the defendant to consent to be bound over where a contested trial would have resulted in

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4. Barnett [1986] Crim. L.R. 758.

his acquittal. The dangers inherent in plea bargaining are well known and need not be further elaborated here.

(e) Witnesses or complainants coming to court may suddenly find themselves required to enter into recognisances for their own behaviour without notice of the evidence against them, without the normal requirements of proof and with limited procedural safeguards (see paragraph 2.23, above).

(f) It seems anomalous to many that a defendant who is acquitted at trial should nevertheless be required to enter into a recognisance with the sanction of imprisonment on failure to comply, because it may be seen to bear the implication that in the court's view the defendant was fortunate in his verdict, and entitled to only a "second-class" acquittal (see paragraph 2.21, above).

(g) The scope of the activities on the part of the person concerned which can trigger the powers to bind him over is unclear. Again, the principal problem is the reach of such powers to cover cases where no substantive crime has been committed or, on the facts, could be proved against the person concerned. As far as binding over to be of good behaviour is concerned, it is for the justices to apply their own standards to decide whether the defendant's behaviour was "contrary to a good way of life".[5] Such a standard seems extremely vague.

(h) There is lack of authority on the extent of the powers, in that it is unclear what standard of behaviour is required of the person who is bound over. It has been suggested that this vagueness may effectively debar a person

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5. Hughes v. Holley [1987] Crim. L.R. 253.

from taking part in public meetings or demonstrations, thus constituting an infringement upon his civil liberties.[6]

(i) There is unfettered discretion on the part of the justices in setting the length of the period and the amount of the recognisance (see paragraph 3.3, above). While the research survey revealed no evidence of abuse here, it may seem unacceptable that such extensive powers should be so vaguely delineated. Even those who advocate the retention of existing powers accept that they are capable of working injustice if their use is not carefully regulated.

(c) Preventive justice

6.4 The principal argument which has traditionally been used in favour of binding over powers is that they exemplify "preventive justice". The following passage from Blackstone has been taken to lie at the heart of binding over powers:[7]

> "Preventive justice is upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice ... This preventive justice consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with and give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behaviour ... The caution which we speak of at present is such as is intended merely for prevention, without any crime actually committed by the party but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension...".

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6. Hewitt, The Abuse of Power (1982), p.125.

7. Blackstone, Commentaries on the Laws of England (1769), iv., pp.251-253.

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In more modern times, Lord Atkinson, giving judgment in the House of Lords in Halliday,[8] said that preventive justice

> "... consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done...."

Recently it has been confirmed that, before exercising their powers to bind over, magistrates must believe that there is a danger of repetition of misconduct, so that it is not proper to bind over a person where the sole object is the deterrence of others.[9] It is said that the fact that binding over may be used in circumstances where conduct falls short of a crime enables the law to intervene at a stage before a crime is committed and where, in the absence of such a power, it is likely that the continuance of the conduct would lead to more serious misbehaviour constituting an offence. The power is thus "preventive" in a strict sense, and such prevention is preferable to conviction. No other legal course is effective for this purpose, for all other criminal court disposals depend upon the fact of conviction. Even the system of formal cautioning, widely used by the police particularly in relation to juveniles, is available only where the person admits the offence.[10]

6.5 Now it might seem acceptable and desirable for a criminal court to be able to intervene before a crime takes place. This is, in part, the rationale underpinning the prosecution and punishment of inchoate offences, such as conspiracy and attempt, or preparatory offences, such as "going equipped for theft" under section 25 of the Theft Act

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8. [1917] A.C. 260, 273.

9. Hughes v. Holley [1987] Crim. L.R. 253 and commentary.

10. Home Office Circular 14/1985 (The Cautioning of Offenders).

1968. In these examples, however, processing the defendant through the criminal courts is entirely justified, independently of the arguments about preventive justice, because the criminal law has in fact already been broken. The conduct of the defendant, such as the agreement in conspiracy or the commission of an act more than merely preparatory to the offence in attempt, is clearly contrary to the terms of a criminal law statute. The difference with binding over is that it involves the imposition of an undertaking upon the defendant on the basis of a prediction about his future lawbreaking. Criminological research indicates that this kind of prediction is very likely to be inaccurate, even where conducted by experts in possession of all available information.[11]

6.6 A slightly different issue of principle arises in relation to binding over powers as exercised under section 115 of the Magistrates' Courts Act 1980. As we have seen, these matters are initiated by way of complaint and thus form part of magistrates' civil rather than criminal jurisdiction. One of the complexities of the whole subject of binding over is that it straddles civil and criminal procedure. This is almost certainly because the historical roots of the powers to bind over relate to a time when the distinction was much less clear than it is today. The civil courts do have some powers in relation to apprehended crime, or preventive justice. As Professor Glanville Williams explains:[12]

> "The civil courts can sometimes grant an injunction or declaration to prevent criminal offences. This can be done under the express or implied authority of a statute. Also, the Attorney-General may sue

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11. Floud and Young, Dangerousness and Criminal Justice (1981), App. C.

12. Williams, Textbook of Criminal Law (2nd ed., 1983), pp.34-35.

> at common law for an injunction to prevent a public nuisance or other breach of public duty; and a private person may, with the Attorney's consent, sue for the injunction in his name.... The action ... is brought in the High Court, which has both criminal and civil jurisdiction; the proceeding is governed by the rules of a civil action and is not thought of as criminal because no question of punishment is involved."

In many ways the powers given to magistrates under section 115 of the Magistrates' Courts Act 1980 are very similar to such powers to grant injunctions. Magistrates may exercise preventive justice in other ways, such as by making an order forbidding the continuation of a dangerous state of affairs in breach of factory regulations, or in making an order for the closure of dirty catering premises.[13] Perhaps the closest analogy with binding over to keep the peace, however, are the powers of the county courts under the Domestic Violence and Matrimonial Proceedings Act 1976, whereby the judge may, on the application of a spouse or cohabitee, grant an injunction forbidding the other party to molest the applicant or a child, or excluding the defendant from the home. By section 2 of this Act the judge may attach a power of arrest to the injunction if he is satisfied that the respondent has caused actual bodily harm to the complainant and is likely to do it again. The respondent may be arrested by a police officer who reasonably suspects him of breaking the injunction.[14] Comparable, though rather less extensive, powers are given to magistrates' courts under the Domestic Proceedings and Magistrates' Courts Act 1978 (see further, paragraph 7.9, below). A further principle suggests itself. It is that whilst preventive justice will often be an important aim of

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13. Food and Drugs Act 1955, s.14.

14. It seems that the power of arrest survives the Police and Criminal Evidence Act 1984, since it is not premised upon an offence having taken place or being about to take place: Leigh, Police Powers in England and Wales (2nd ed., 1985), pp.85-86.

civil proceedings where a remedy such as an injunction is sought, in criminal cases it is regarded, at most, as a subsidiary purpose of the proceedings, the main purpose of which is to determine liability and punishment for a past breach of the criminal law, determined in accordance with the normal rules of criminal evidence and procedure. To those who regard the distinction between civil and criminal procedure as crucial, a distinction between binding over under section 115 on the one hand and under the 1361 Act and common law on the other would, therefore, be appropriate. Law reform need not follow the same path in these two areas. For those who regard the line between civil and criminal law as "somewhat arbitrary" in this context, as Professor Williams puts it,[15] the distinction is less helpful.

(d) Flexibility and adaptability of the law

6.7 Perhaps it may be more appropriate to base the rationale of binding over powers in something other than preventive justice. In any system of criminal law, it may be said, there is a need for flexibility and adaptability at the margins. No set of criminal offences can cater in advance for all variations of misbehaviour. Binding over powers provide just this degree of flexibility. They fill inevitable gaps amongst existing statutory and common law offences. Used with common sense and sensitivity they can offer a means of dealing with relatively minor matters coming before the criminal courts, where more formal means would offer no remedy at all. The examples of cases in which binding over has been used, cited in paragraph 5.2, above illustrate this point. Is binding over really so objectionable in principle that it is better for the peeping Tom, for example, not to be dealt with by the magistrates' courts at all? Do not some matters in a society require regulation without the full rigour of the criminal law?

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15. Williams, op. cit., p. 35.

Certainly the more principled view is that the criminal law should be certain, and that changes to it should be carefully considered, taking account of all points of view, even if this means that a few apparent miscreants fall outside the net. But many would take the practical approach that, particularly with more minor matters, the courts' powers should be flexible enough to deal with new variations as they arise. The uncertainty of scope of binding over which, from one point of view is a serious shortcoming, is regarded from another as a desirable flexibility. According to the Justices' Clerks' submission to us, "binding over can be an undramatic, low-key way of discouraging acts of nuisance":[16]

> "To allow criminal proceedings to run with sentences at the end of the day may well exacerbate relations, whereas an experienced and sympathetic court can talk to both parties and encourage them to moderate their attitudes... This happens time and time again and is one of the most valuable functions of magistrates in preserving the Queen's Peace."

It is now appropriate to turn to consider these claims of practical advantage.

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16. Justices' Clerks' Society, Power to Bind Over, (1981), p.7.

(7) THE PRACTICAL ARGUMENTS

7.1 It may be said of binding over to keep the peace during the course of proceedings that it offers the following main practical advantages:

(a) Binding over allows the courts to deal with certain forms of behaviour which, although not contrary to the criminal law, or where the evidence may be insufficient to gain a conviction, cause anxiety, nuisance or disturbance to those involved or to the public and which cannot at present be dealt with in any other way by the criminal courts.

(b) Binding over can be used by the courts to defuse difficult confrontational situations, for example by binding over both parties to a neighbour or domestic dispute. Binding over is said to have the advantage that neither side is chosen by the court as being the innocent party and hence neither can claim a victory.

(c) Binding over avoids giving the person concerned a conviction or criminal record whilst giving him a warning for the future.

(d) Binding over a defendant without a full hearing saves court time and public money which would otherwise be involved in pursuing the case to its outcome.

(a) Only available way of dealing with some 'anti-social' behaviour

7.2 The first claim, then, is that binding over during the course of proceedings provides a means of dealing with a range of cases which otherwise could not be tackled by the criminal courts. Although it is difficult to be precise, it is thought that about one-third of the binding over orders made in the course of proceedings in the research

sample related to cases either where the police made an arrest with a view to binding over and where the conduct might have, but more probably did not, constitute an offence or other cases where there was probably no substantive criminal offence to cover the behaviour. This would indicate an annual total of around 8,000 cases currently dealt with by way of binding over to keep the peace where no substantive offence had been committed or could be proved. Referring back to the examples given in paragraph 5.2, above, if we leave aside for the moment the class of neighbour or family disputes, it will be seen that the cases dealt with by way of binding over which currently involve no substantive offence seem to fall into two groups. The first involves relatively minor incidents of disorder, such as shouting, ill-tempered arguments and rowdy behaviour and the second group involves other relatively minor incidents, often with sexual connotations, such as the pestering of females, overt sexual behaviour causing offence to others and the activities of peeping Toms. There is no doubt that individual incidents of this sort may cause distress, anxiety or alarm to members of the public, and that the bind over offers an "undramatic, low-key way" of dealing with them.[1] There is, however, an important question involved here. Should such cases, involving no substantive offence, be brought before the overburdened criminal courts at all?

7.3 In many ways it seems much better for these problems to be tackled by informal mediation where possible, and provided both parties are agreeable to this. There are now several such schemes operational in England and Wales, and they have been the subject of two Home Office surveys in recent years.[2] For example, two schemes run by the Inner

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1. See para. 6.7, above.

2. Marshall, Reparation, Conciliation and Mediation: Current Projects and Plans in England and Wales Home Office Research and Planning Unit Paper No. 27 (1984); Marshall and Walpole, Bringing People Together: Mediation and Reparation Projects in Great Britain, Home

London Probation Service, at Tower Hamlets and Hammersmith, take referrals from the Police, probation service, social services and Citizens' Advice Bureau, and arrange mediation which is conducted by trained volunteers. The emphasis is upon disputing parties who have some prior and continuing relationship (neighbours or kin) and the aim of the schemes is to "ease some of the burden on the courts by providing a credible alternative for the resolution of disputes and less serious crimes; to enable the victims to feel more involved in the process of achieving a satisfactory resolution of 'their crime'...; and to reduce the risk of protracted ill-feeling and, therfore, further offences between the offender and victim...".[3] The mediation process involves an informal presentation by both sides of the dispute including written evidence from other people and the eventual production of a written agreement in clear and simple language signed by the parties setting out what they have voluntarily agreed to undertake in relation to the dispute between them. A follow-up check is conducted to see how the process is going and whether the agreement is being adhered to by the parties. Detailed consideration of such programmes lies outside the field of the present enquiry, and many of the schemes are still at an experimental stage, but it may be that such informal procedures will offer in the future a more appropriate means of dealing with some of the disputes currently falling within the scope of binding over to keep the peace.

7.4 As far as the first group of cases identified above is concerned, the passage of the Public Order Act 1986 has provided the opportunity for extensive discussion in

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Office Research and Planning Unit Paper No. 33 (1985). Details are taken from the 1985 Paper, pp.14-15. See also Milner, "Settling disputes: the changing face of English Law", (1974) 20 McGill Law Journal 521-553.

3. Marshall and Walpole, op. cit.,(1985), p.14.

Parliament and elsewhere over the proper reach of the criminal law in relation to minor incidents of disorder. It would appear that Parliament, in enacting section 5 of that statute, has extended the reach of the law into at least some of the areas previously being dealt with by way of binding over during the course of proceedings. Section 5 provides:

"(1) A person is guilty of an offence if he -

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove -

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) A constable may arrest a person without warrant if -

(a) he engages in offensive conduct which the constable warns him to stop, and

(b) he engages in further offensive conduct immediately or shortly after the warning.

(5) In subsection (4) "offensive conduct" means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale."

7.5 Central to the Parliamentary debates on the clause which became section 5 was the concern, on the one hand, to respond to perceived public anxiety about relatively minor acts of hooliganism and disorder and, on the other hand, not to extend the boundaries of criminal liability any further than was really necessary. In the House of Lords, Lord Glenarthur, in summing up the debate on the clause, said that the law of public order was concerned with achieving "public tranquillity", which was being "blighted by petty, mindless hooligans.[4] He also said that the new offence would operate at a lower level than the police's common law powers to deal with breaches of the peace. While some of their Lordships, such as Lord Elwyn-Jones, objected to the clause on the basis that it would extend criminal liability too far,[5] hardly any reference was made in the debates to the present function of powers to bind over to keep the peace. Lord Denning did mention binding over as being one possible way for the community to show that disorderly

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4. Lord Glenarthur, Hansard (H.L.), 16 July 1986, vol.478, col.951.

5. Lord Elwyn-Jones, Hansard (H.L.), 16 July 1986, vol.478, col.934: "In my submission, Clause 5 creates a new offence in wide and vague terms which, I submit, extends the bounds of criminality much too far."

conduct would not be tolerated,[6] but he evidently regarded it as an insufficient response, because he was in favour of extending the substantive law.

7.6 It appears that this new offence has now criminalised much of the disorderly conduct which was formerly not criminal in itself but was dealt with (if at all) in the courts by way of binding over to keep the peace. An implication of this may be that the role of the criminal courts should extend so far, but no further. The present law in England and Wales may be contrasted with that in Scotland, where the very broadly defined offence of "breach of the peace" is available and extends to situations which would not be reached by section 5. It covers, for instance, disorder taking place entirely on private premises, an extension considered but rejected by Parliament in the passage of the Public Order Bill. The enactment in section 5 of an offence which is narrower than the offence of "breach of the peace" in Scotland, therefore, may be seen as providing a limit beyond which the law should not go, and as strengthening substantially the case for the abolition of powers to bind over prior to conviction. For discussion of the relevant law in Scotland, see chapter 10 below.

7.7 The second group of activities identified above, the relatively minor sexual matters, includes a range of different sorts of case. Some may well not involve a criminal offence at all. For others, there must be doubt whether some of the conduct is sufficiently serious to justify prosecution. The Code for Crown Prosecutors, discussed in paragraph 7.17 below, states that the likely imposition of a nominal penalty should militate towards the issuing of a formal caution rather than prosecution, and

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6. Lord Denning, Hansard (H.L.), 16 July 1986, vol.478, col.936.

this might well apply to many such cases. The Code makes special mention of sexual offences, but in the context of identifying aspects of a particular offence making prosecution appropriate, such as where an element of seduction or corruption exists, rather than indicating cases when no prosecution would be necessary. Section 5 of the Public Order Act 1986 would seem not to extend to the activities of the peeping Tom since he might well not be using "threatening, abusive or insulting words or behaviour". The Scottish offence, mentioned above, does provide a device for convicting the peeping Tom. It may be that some of the other incidents revealed in the survey, such as overt homosexual behaviour in the street,[7] could be regarded as "insulting" and fall within the wording of section 5. Kerb-crawling, which was formerly sometimes dealt with by way of proceedings leading towards a bind over, now constitutes a substantive offence under the Sexual Offences Act 1985. While there may be doubts about the practicality of introducing more criminal offences to deal with other fairly minor matters which come within the current ambit of binding over, it is in accord with accepted legal principles that anyone processed through the criminal courts should be charged with a specific criminal offence. If section 5 is found not to extend as far as to cover all the incidents mentioned in the survey, this may be an argument for considering further specific legislation rather than for the retention of binding over during the course of proceedings. The other possibility is the creation of a broadly worded "catch-all" offence, along the lines of "breach of the peace" in Scotland. This would be attractive to some, and it would avoid some of the problems of binding over, since it would be confined to the imposition of sanctions upon convicted persons only, but it would suffer from the defects of vagueness and uncertainty which presently characterise binding over.

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7. Masterson and Cooper v. Holden [1986] 1 W.L.R. 1017.

(b) Defusing neighbour/domestic situations

7.8 The second practical advantage cited for binding over is that it provides a valuable means of defusing confrontational situations, such as may develop between neighbours and within families. Binding over may be said to have the advantage that neither side is favoured by the court and neither can claim a victory. There were numerous "neighbour" cases in the research survey. Primarily they arise under the complaint procedure under section 115 of the Magistrates' Courts Act 1980. About 3% of binding over proceedings (about 1000 cases per year) are initiated by a private individual, but many more are brought by a police officer after the matter has been brought to his attention. Other such cases come before the courts by way of prosecution or arrest for breach of the peace. The principal characteristic of these cases seems to be that a dispute develops between the parties, sometimes over a long period of time, during which tempers become frayed. In many cases there is an element of fault on both sides, but in any event it is difficult for a police officer responding to a call, or for the court, to identify a clear wrongdoer. The advantage of binding over to keep the peace in such cases is said to be that the court has power to bind over both parties to the incident, metaphorically "knocking their heads together". Binding over here may achieve some kind of justice, and certainly will expedite proceedings. Mediation by a community agency, mentioned above, seems to offer a possible better alternative. It is claimed by the proponents of binding over that in these cases the confrontation is defused since both parties are put under warning but neither can claim a victory in the argument. Sometimes, however, the court's response could make matters worse, as where a party who regards himself as wholly innocent in the dispute finds himself required to consent to a bind over, on pain of imprisonment.

7.9 As is well known, the police have often been reluctant in the past to prosecute in relation to domestic incidents, though there have been indications recently that this attitude may be changing.[8] The existence of binding over, however, offers the police the option of defusing a difficult situation by removing one of the parties from the scene, usually the husband, who can then be brought before the court on complaint. This offers an immediate respite and may be more effective than charging the aggressor with assault, since by the time the case is brought the parties may be reconciled or the other party reluctant to testify. Binding over may then be seen as a means of providing some measure of relief for one or other of the participants and, for that matter, the neighbours who may be subjected to regular late night arguments and other incidents of domestic strife. It also provides a means of intervening in a domestic case where it is unclear who started the trouble and where evidence sufficient to produce a conviction is unlikely to be forthcoming.

7.10 In order to see to what extent binding over to keep the peace may offer a valuable additional remedy, it is clearly important in this context to consider what other powers are available to the courts to deal with molestation or violence in such cases. Magistrates' Courts have powers under the Domestic Proceedings and Magistrates' Courts Act 1978 to make two kinds of order, a "personal protection order" and an "exclusion order".[9] The first of these, with which we are primarily concerned, may be applied for by

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8. See, for instance, the evidence of the various police bodies to the House of Commons Select Committee on Violence in Marriage, Report (1974-75) H.C. 553, HMSO. In June this year it was announced that Scotland Yard had issued new guidelines to police on how to handle incidents involving domestic violent disputes, including a greater readiness to prosecute.

9. Cretney, Principles of Family Law (4th ed., 1984), pp.237-266.

either party to a marriage. Proceedings are started by way of complaint and summons in the usual way. The hearing will be before the domestic court and will not be open to the public. Before making the order the magistrates must be satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family, and that an order is necessary for the protection of the applicant or child. The court may then order that the respondent shall not use, or threaten to use, violence against the person of the applicant, or the child, or both.

7.11 These powers are similar to those available to County Courts in matrimonial causes or under the Domestic Violence and Matrimonial Proceedings Act 1976, but they are narrower in two important respects. The first is that an application to the magistrates may only be made by one of the parties to a marriage but not, as under the 1976 Act, by parties who are cohabiting as man and wife in the same household.[10] The second is that the County Court jurisdiction extends to protect the applicant from "molestation" as well as violence or anticipated violence. Thus in Horner v. Horner[11] the wife already had a personal protection order made in her favour by the magistrates. Her husband then repeatedly telephoned the school at which the wife was a teacher, and made disparaging remarks about her. He also hung scurrilous posters about the wife on the school railings addressed to the parents of the children she taught. The Court of Appeal was prepared to grant an injunction prohibiting the respondent from "assaulting, molesting or otherwise interfering with"[12] the applicant

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10. Domestic Violence and Matrimonial Proceedings Act 1976, s.1(2).

11. [1982] 2 W.L.R. 914.

12. Ibid., at p. 917, per Dunn L.J.

under the 1976 Act, even though the magistrates' order was already in force. "Molestation" is thus widely construed and "pester"[13] was regarded by Stephenson L.J. as perhaps the best single synonym. So in Vaughan v. Vaughan[14] a husband was held to have molested his wife when he called at her house early in the morning and late at night, called at her place of work and made "a perfect nuisance of himself to her the whole time".[15]

7.12 It may be that some of the "domestic" cases presently dealt with by way of binding over would fall outside the scope of the 1978 Act, either (i) because the parties involved are not married or (ii) because the conduct complained of amounts to harassment, pestering or other annoying activities rather than actual violence or the threat of violence. Examples would be where the parties were divorced but one of them found the situation difficult to accept and kept returning to the house, or where there is trouble over access to the children. Fewer would fall outside the 1976 Act. As described above, "molestation" is widely construed, but the Act only applies where the parties are living with each other in the same household as husband and wife. Whilst the House of Lords in Davis v. Johnson[16] made it clear that this phrase should be loosely interpreted, there must come a time where former cohabitees have been apart for so long that no injunction could be granted if one partner continues to pester the other at the latter's new home. The bind over would, however, offer a means whereby the magistrates' court could seek to restrain such behaviour, and it would also extend, of course, to people who had never cohabited but where one party persisted

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13. Vaughan v. Vaughan [1973] 1 W.L.R. 1159, 1165.

14. [1973] 1 W.L.R. 1159.

15. Ibid., at p. 1162, per Davies L.J.

16. [1979] A.C. 264.

in pestering the other, perhaps by repeated telephoning, or following, causing annoyance or anxiety. Even in cases which are covered by the 1978 Act, arrest followed by binding over has the clear advantage that it can be implemented immediately by the police, whereas a power of arrest can only be added to an order under the 1978 Act, or to an injunction, in limited circumstances (and in practice for a limited time). For these reasons binding over could have a role to play in this area.[17] Consideration might, however, be given to extending the powers available to magistrates under the 1978 Act to correspond with those available in the County Court, since access to the former may be quicker and cheaper than to the latter. It might also be considered whether it would be feasible or desirable to go further and extend domestic violence protection by way of injunction beyond married and cohabiting partners and their children. If not, it is clear that the abolition of existing powers to bind over to keep the peace would leave a gap in this area. Once again, the central question is whether pestering and the like is a sufficiently serious matter to justify the attention of a court when it falls short of a criminal offence such as assault or a civil wrong such as trespass; but the question also arises of whether police intervention falling short of conviction and sentence may, in the particular circumstances, be a better way of dealing with violence of an undoubtedly criminal nature.

(c) Avoiding a criminal record

7.13 The third practical advantage claimed by the proponents of the power to bind over during the course of proceedings is that it avoids stigmatising the person with a criminal record whilst still giving him a clear warning for the future. This claim is controversial. Clearly, it can

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17. See Parker, "The taking of recognisances as a matrimonial remedy", (1979) 9 Family Law 76.

only hold any strength in respect of those defendants who would, in the absence of the power to bind over, have been convicted. It is not relevant, therefore, in cases where a witness or prosecutor is bound over or where the person bound over has actually committed no substantive offence, or where the prosecution would be unable to prove that he had. In these cases, surely, binding over involves the creation of a degree of stigma which would not otherwise attach to that person. Nevertheless, the research survey shows that the majority of persons who are bound over are defendants who might well otherwise have been convicted of a substantive offence. In these cases, the argument goes, there is an advantage to the defendant in being bound over prior to conviction. It is doubtful, however, whether the current law and practice actually provides very much of an advantage.

7.14 The Rehabilitation of Offenders Act 1974, section 7(5) provides that:

> "No order made by a court with respect to any person otherwise than on a conviction shall be included in any list or statement of that person's previous convictions given or made to any court which is considering how to deal with him in respect of any offence".

This section would appear to require a distinction to be drawn between binding over imposed during the course of proceedings and binding over imposed on sentence. The former should not be recorded in the list of previous convictions. In practice, however, it seems that no such distinction is drawn. There is apparently no uniformity of notification of bind overs on the making of an order and no uniformity in their being listed in the antecedents.

7.15 In general terms it is doubtful whether there is much strength in the claim that binding over prior to conviction involves less stigma for the defendant than

proceeding to conviction. As a former Lord Chancellor has observed:[18]

> "Whatever be the technical position, in the minds of innumerable people who read the report in a local newspaper there is the belief that the person who has been ordered to enter into recognisances, with or without sureties, to be of good behaviour or to keep the peace has been convicted and even when there is more legal knowledge there is a general feeling that behind the order is a piece of discreditable conduct."

The creation, in 1956, of a right of appeal against binding over may seem to reinforce this view.

7.16 It appears that at least some bind overs are recorded in computerised police records, but it is not clear whether these would distinguish between bind overs made against convicted defendants and others, or between bind overs imposed in criminal or civil proceedings.

(d) Saves court time and public money

7.17 The fourth claim is that binding over in the course of proceedings saves substantial court time and public money. Some attempt was made in the research to investigate the extent of likely savings. About half of the courts in the sample felt able to give an estimate of the time saved in consequence of binding over, and in the 357 cases involved, an average saving of some two hours per case was reported. It will be recalled that the number of binding over orders made annually in magistrates' courts was estimated to be 34,000, of which about 25,000 were imposed at some stage prior to the conviction and sentencing of the

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18. Per Viscount Kilmuir at Hansard (H.L.), 10 April 1956, vol. 196, col.940, cited in Williams, "Preventive Justice and the Courts", [1977] Crim. L.R. 703, 708. See also Williams, "Preventive Justice and the Rule of Law", (1953) 16 M.L.R. 417, 427: "Being bound over is, at least, a stain on a person's character ...".

offender. An average of two hours time saved in the 50% of courts which responded to the question would suggest an annual total saving in the order of 25,000 court time hours by use of the bind over during the course of proceedings.

7.18 These figures look substantial, but two qualifications must be borne in mind. The first is that these figures are necessarily speculative, based upon the multiplication of fairly crude estimates and that it would be dangerous to place too much reliance upon them. The second is that it by no means follows that, if the courts' powers to bind over during the course of proceedings were abolished, such economies would be lost. It is certainly arguable that the very existence of the powers to bind over encourages the prosecutor to persist with cases which in the absence of the powers would be dropped, and so it may even be that their abolition would save court time and money rather than the reverse.

7.19 There was a good deal of evidence, prior to the introduction of the Crown Prosecution Service, that far too many weak cases were reaching trial.[19] It seems to be generally accepted that it should be one of the objectives of the new Service to weed out these cases at an earlier stage. However, whilst the Prosecution of Offences Act 1985 makes specific reference to the taking over by the Service of "the conduct of all binding over proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person)",[20] the Code of Guidance for the Crown Prosecution Service[21] makes no

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19. E.g. McConville and Baldwin, Courts, Prosecution and Conviction (1981); Sanders, "Prosecution Decisions and the Attorney-General's Guidelines", [1985] Crim. L.R. 4.

20. Sect.3(2)(c).

21. Code issued pursuant to s.10 of the Prosecution of Offences Act 1985; it is a public declaration of the principles upon which the Crown Prosecution Service will exercise its functions.

mention of the considerations to be weighed by the prosecutor in deciding whether to press ahead to achieve a bind over or in deciding whether to terminate proceedings early in the light of an agreement by the defendant to be bound over. Some statements in the Code do appear to have implications for the prosecution of binding over cases, however. Paragraph 4 provides:

> "When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the Crown Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Crown Prosecution Service does not support the proposition that a bare prima facie case is enough, but rather will apply the test of whether there is a realistic prospect of conviction."

On the face of it, this principle would appear to exclude the possibility of pursuing a prosecution or complaint with the objective of achieving a bind over during the course of proceedings where there was reason to think that no substantive offence had occurred or could be proved against the defendant. Adherence to this principle by prosecutors would have the effect of restricting substantially the ambit of binding over. Paragraph 8(i) further provides:

> "When the circumstances of an offence are not particularly serious, and a court would be likely to impose a purely nominal penalty, Crown Prosecutors should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution."

For these purposes, perhaps, a bind over might well be regarded as "a purely nominal penalty". So on this basis, even where an offence certainly has been committed and can be proved against the defendant, prosecution with a view to achieving a bind over may well be regarded as inappropriate.

7.20 In the light of these Guidelines, it would seem that the only circumstance in which a bind over should be sought by the Service is where a prosecution has properly been undertaken in the first place but where for some unexpected reason the chances of obtaining a conviction subsequently diminish.[22] It seems clear that the role of the Crown Prosecution Service in the use of binding over to keep the peace is crucial and, inevitably, one about which information is necessarily very sparse at this stage.

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22. Even in these circumstances, the criteria for making a binding over order must be fully satisfied.

PART III : BINDING OVER AT THE SENTENCING STAGE

(8) BINDING OVER TO COME UP FOR JUDGMENT

8.1 The power to bind over to come up for judgment was outlined in paragraphs 2.12 - 2.14 above, where it was noted that it is a common law power available at the sentencing stage and only in the Crown Court. It has a long history, pre-dating current non-custodial disposals. The effect of making such an order is that the defendant is bound over on specified conditions under which, if he breaks one of the conditions, he will be brought back before the court for sentence but, if he does not break any of the conditions during the specified period, he will never have to be sentenced for the offence. The imposition of conditions is unique to this species of bind over, and there appears in principle to be no limitation upon the kind of conditions imposed or their duration. One recently reported use of the power to bind over to come up for judgment is Williams,[1] where a court imposed a condition that the convicted person should not return to this country for five years. The occasional use of the power in such cases was endorsed by the Court of Appeal, though disapproved on the particular facts. Statistics made available to us by the Home Office relating to 1980 indicate that the power to bind over to come up for judgment was used in 434 cases that year. Its use seems to vary considerably through the country. Of the 43 Police Force Areas, in 21 the Crown Courts did not use it at all during 1980. A further 12 used it in only a handful of cases. At the other end of the scale, it was used on 113 occasions in Crown Courts in one urban area and on 72 occasions in another.

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1. (1982) 4 Cr.App.R.(S.)239; [1982] Crim. L.R. 762 and commentary.

8.2 It seems to us that the only similarity between binding over to come up for judgment and the powers to bind over to keep the peace is one of nomenclature. The Commission regards binding over to come up for judgment as falling outside its terms of reference and, accordingly, no recommendations are made with respect to it here.

(9) BINDING OVER TO KEEP THE PEACE AS A SENTENCING OPTION

9.1 The use of binding over to keep the peace or to be of good behaviour when used at the sentencing stage is not separately recorded in the Criminal Statistics for England and Wales. This is probably because the Statistics record the principal sentence given for each defendant and binding over is rather more in the nature of an ancillary order (see paragraph 2.20 above for discussion of this point).

9.2 It appears from the research survey that the bind over to keep the peace is imposed at the sentencing stage in about a quarter of the cases in which it is used by magistrates. Estimates from the research study suggest a total number of binding over orders made on sentence in the order of 9000 per annum. The constitutional issues of principle, discussed above in relation to the use of binding over during the course of proceedings, do not arise to the same extent at the sentencing stage where, clearly, the defendant has pleaded to or been found guilty of a substantive offence according to normal criminal procedure. The law reform issue here is a rather different one: whether binding over has something distinct and useful to offer in comparison with other non-custodial sentencing options. Binding over to keep the peace at the sentencing stage could be retained, with or without a change of name, even if the powers to bind over during the course of proceedings were abolished or reformed. Or it could be abolished, whether together with abolition of binding over during the course of proceedings or not. Or it could be redesigned. These three possibilities are considered in turn below.

(a) Duplication of powers?

9.3 The Justices' Clerks' Society, for one, argues that binding over should be retained as an option for the

sentencer because it offers him something quite distinctive. It is claimed that a bind over, particularly when combined with a fine, offers the dual aspect of punishment for the offence plus a warning for the future.[1] Such a warning might again be characterised as an effort towards "preventive justice", but there is surely nothing unique about binding over in this respect. A forward looking element is common to most non-custodial sentences, including the suspended prison sentence, the probation order, conditional discharge and the deferment of sentence. All of these measures, to some degree, are geared towards achieving a change in the defendant's future behaviour and the prevention of potential lawbreaking.

9.4 The bind over certainly offers something quite different from the suspended sentence and the probation order, but this is because they occupy different places in the range of sentencing options. The reasoning which should properly lead a sentencer to impose a suspended sentence must, at an early stage, have rejected an option like binding over, for statute provides that a suspended sentence should only be imposed where an immediate custodial sentence would have been appropriate in the absence of the power to suspend.[2] Similarly the making of a probation order requires a recognition on the part of the sentencer that the nature of the offence and the character of the offender make the supervision and support of a probation officer desirable.[3] The arguments about the value to the sentencer of binding over is, therefore, unaffected by the existence of these two options.

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1. Justices' Clerks' Society, Power to Bind Over (1981), p.6.

2. Powers of Criminal Courts Act 1973, s. 22(2).

3. Powers of Criminal Courts Act 1973, s. 2.

9.5 Binding over has a superficial similarity to deferment of sentence but in England, unlike Scotland,[4] the use of deferment has been closely delineated by statute[5] and Court of Appeal decisions. That Court has laid down guidelines for its proper use in George.[6] Its use is appropriate in only a narrow range of circumstances. It should be imposed to enable the court to take into account the defendant's conduct after conviction, or a significant change in his circumstances, and is limited by statute to a single period of deferment of up to six months. It appears that very specific conditions may not be written into a deferment,[7] though the sentencer should make it clear to the defendant, preferably in writing, what is expected of him during that period, and a general requirement that the defendant keep out of trouble during the deferment may be inferred in every case. If the defendant is convicted of a further offence during the period of deferment the court can sentence him for the original offence as well as for the new one. Otherwise, when he reappears at the end of the deferred sentence, the court's powers are the same as they originally were. The court should be informed, normally by way of a social enquiry report, of what has happened to the defendant in the interim. If he has substantially

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4. See Nicholson, The Law and Practice of Sentencing in Scotland (1981), p. 7: "It is competent for a court to defer sentence after conviction for a period and on such conditions as the court may determine.... There is no restriction on the length of time for which sentence may be deferred, and it may be - and commonly is - deferred more than once in respect of a single indictment or complaint." One likely reason for the development of the use of deferment of sentence in Scotland is the non-existence of conditional discharge. See below, Chap. 10(a).

5. Powers of Criminal Courts Act 1973, s. 1, as amended by Criminal Justice Act 1982, s. 63.

6. [1984] 1 W.L.R. 1082.

7. Skelton [1983] Crim. L.R. 686, though see commentary by Thomas.

conformed or attempted to conform with the proper expectations of the deferring court then the defendant may legitimately expect a lenient sentence to be imposed. If his behaviour has been unsatisfactory the court may resort to a custodial sentence. Because of the various restrictions imposed upon the use of deferment of sentence by the legislature and the appellate courts, it is arguable that binding over offers more flexibility at the sentencing stage than deferment.

9.6 It does seem, however, that in part the option of conditional discharge covers the same ground as binding over to keep the peace. Section 7 of the Powers of Criminal Courts Act 1973 provides that where a court:

> "... is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate,... [it] may make an order discharging him ... subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified therein."

A conditional discharge, therefore, contains within it a clear warning for the future. The court is required to explain to the defendant in ordinary language that if he commits another offence during the specified period he will be liable to be sentenced for the original offence as well as the new one. The Criminal Statistics for England and Wales for 1985 reveal that 15% of offenders sentenced for indictable offences in magistrates' courts received a conditional discharge. 5% of summary, non-motoring offences also attracted this penalty. It is the second most frequently imposed sentence in magistrates' courts after the fine. If the defendant commits no offence during the specified period the order ceases to have effect at the end of that time. The 1985 Statistics show that overall 11% of conditional discharges are breached (this compares with 17% breach rates for the probation order and the community service order and a 28% breach rate for the fully

suspended sentence).[8] Of those who did breach the conditional discharge, 13% were given immediate custody and 3% a suspended sentence. In 32% of cases, no specific penalty was given[9] and in the remaining 52% of cases the penalty was a fine. It will be seen that the predominant use of the fine as the penalty for breach of a conditional discharge makes the conditional discharge in practice very similar to binding over to keep the peace.

9.7 Some may say that it is difficult to see why binding over on its own should be regarded as much more effective in communicating the court's attitude than a conditional discharge. True, the conditional discharge is sometimes criticised as appearing to be too much of a "let-off", but is this really any the less true of binding over on sentence? Indeed, the conditional discharge offers a greater degree of flexibility for the sentencer since the punishment for future misbehaviour is not fixed in advance. Breach of a conditional discharge can be dealt with by way of custody if necessary, whilst breach of a bind over can only be dealt with by forfeiture of all or a proportion of the recognisance. It is true that on a bind over the threat may hang over the defendant's head for a period longer than the three years available for the conditional discharge, but three years is surely long enough to cater for what must have been regarded by the court as a relatively non-serious matter to attract that sentence in the first place,[10] and there was no indication in the research survey that courts wished to bind over for longer periods of time. An offender under a bind over does,

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8. Criminal Statistics for England and Wales 1985 (1986), HMSO, Table 7.40.

9. Criminal Statistics for England and Wales 1985 (1986), HMSO, Table 7.10; Powers of Criminal Courts Act 1973, s. 8.

10. See Cross and Ashworth, The English Sentencing System (3rd ed., 1981), p.11.

however, differ from one conditionally discharged in that he may be brought back to the court at any time and dealt with without having been convicted of a further offence, on establishing to the civil standard of proof that he has failed to keep the peace or be of good behaviour. The objections of principle to these ramifications of binding over have already been described.

(b) Combining the conditional discharge and fine

9.8 A comparison between binding over and the conditional discharge may lead one to think that there is little which can be achieved in sentencing objectives by the former which cannot be achieved by the latter, at least when the latter is standing alone on sentence. This suggests the abolition of binding over as a separate sentencing option. Indeed, it seems that the introduction of the conditional discharge as a new sentencing option by section 7 of the Criminal Justice Act 1948 was in part intended as a replacement for binding over at the sentencing stage.[11] The picture is more complex in the modern sentencing system, however, since the bind over may be combined with other sentences, particularly with the fine; a conditional discharge may not be combined with any other penalty. The research survey found that in the majority of sentencing cases where the bind over was used it accompanied a fine; its combination with immediate imprisonment, detention centre order, community service and conditional discharge

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11. Involving the repeal of the Probation of Offenders Act 1907, under which statute there was power to discharge an offender conditionally upon entering into a recognisance, with or without sureties, to be of good behaviour and appear for sentence or conviction for a period of up to three years. The 1948 Act substituted the conditional discharge for this order, making it dependent upon conviction. See Hansard (H.C.), 27 November 1947, vol. 444, col. 2143 (Criminal Justice Bill, Home Secretary).

was also recorded, though each in a small number of cases.[12] What seems to be wanted by sentencers is the effect achieved by combination of fine and bind over, which is that of an immediate penalty together with a threat of a further penalty for breach of the conditions. This cannot be achieved by the conditional discharge alone but it could be achieved were it legally permissible to combine the conditional discharge and fine together.

9.9 The current provisions relating to the conditional discharge refer to the measure as one to be imposed "where it is inexpedient to impose punishment". As this stands, the combination of conditional discharge and fine is clearly impermissible, since a fine constitutes punishment.[13] Though from time to time it has been suggested that the law should be changed so that this combination would become permissible, sentencers thus being able to add a "sting in the tail" of the apparent lenience of the discharge, such arguments have been more persistent in respect of another forbidden combination, that of probation order and fine.[14] Some may doubt, however, whether to make available the combination of conditional discharge and fine would be a

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12. The Rehabilitation of Offenders Act 1974, s. 5(4) provides, in relation to bind overs imposed on sentence, that the rehabilitation period shall be 12 months or the duration of the bind over, whichever is the longer, but s. 6(2) further provides that where sentences are combined the longer rehabilitation period is the relevant one. Thus where a fine and a bind over stand together, the rehabilitation period would be five years.

13. McClelland (1951) 35 Cr.App.R. 22; Powers of Criminal Courts Act 1973, s.7.

14. See Criminal Law Revision Committee, Felonies and Misdemeanours (1965), Cmnd. 2659, para. 73 and Advisory Council on the Penal System, Non-Custodial and Semi-Custodial Penalties (1970), HMSO, ch.8. The Advisory Council recommended that "courts should be empowered to combine a fine ... with a compulsory form of supervision" (Rec. no.33), but their proposal has not been acted upon.

desirable change. It may well be that the natural thought process when selecting sentence, particularly in the magistrates' courts, is to start from the fine, since this is overwhelmingly the most frequently imposed sanction. If the fine is seen to be inappropriate for some reason, another sentence will then be considered. The reason for a sentencer moving in this way from a fine to a conditional discharge would probably be either (i) that the offence and personal characteristics of the offender were such that no punishment need be inflicted immediately, a warning being sufficient, or (ii) that the defendant could not afford to pay the fine appropriate for the offence.[15] In either case, for the sentencer to add a fine once he had moved to a conditional discharge would seem to be quite illogical. A further objection to allowing the combination of fine and conditional discharge is that where the defendant breaches the discharge this may seem to involve punishing him twice for the original offence, the second punishment being inflicted up to three years after that offence was committed. The argument involving double punishment is controversial, and some would claim that there are not two penalties here, merely one penalty split into two. If this is true, then to maintain equality of treatment between defendants, the addition of the conditional discharge might appear to require some reduction in the level of the fine.

(c) The suspended fine

9.10 A further possibility is to re-cast the existing powers to bind over to keep the peace in a form which is more in keeping with the other, statutorily circumscribed, non-custodial measures. It can be seen that the practical effect of a bind over on sentence is equivalent to that of a suspended fine. It may be argued,

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15. Powers of Criminal Courts Act 1973, s.7; McGowan [1975] Crim.L.R. 113; Home Office, The Sentence of the Court (4th ed., 1986), para. 5.17.

then, that reform could take the form of replacement of binding over by a specific statutory power to suspend, or partly suspend, a fine. This option does not seem to have been requested by the courts in the past or seriously entertained by penal reform bodies in England, but it is a sentencing alternative available in several European countries, including France, Italy, Belgium and the Netherlands.[16] In those countries, the provisions enabling the court to suspend, or partly suspend, a fine are often very similar to those enabling it to suspend, or partly suspend, a custodial sentence. Completion of a specified period without further conviction means that the penalty need not be paid; breach of the suspended fine normally involves activation of the fine in addition to the penalty imposed for the new offence.

9.11 Occasionally the suspended fine could be a useful option for English courts, but some may see substantial dangers inherent in the idea. One of the principal advantages of the fine is that it has the immediacy of retributive justice for the offence and hits the offender in the pocket for the offence committed. There is a possibility that a suspended fine would not be taken seriously, by courts or by offenders.[17] A greater problem, perhaps, relates to the fact that a substantial number of defendants who are in straitened circumstances, who would find it impossible to pay the tariff fine. In such cases the principles of sentencing dictate that the fine should be reduced to a level which the defendant can

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16. The provisions are discussed in Grebing, The Fine in Comparative Law: A Survey of 21 Countries (1982). See, for example, French Code of Criminal Procedure, Arts. 734-737; Italian Penal Code, Arts. 163-168. In France it seems that the percentage of fines which are suspended is small, but in Italy the measure is frequently used.

17. Grebing (1982), p.122.

reasonably afford to pay.[18] A risk involved in giving sentencers power to suspend, or partly suspend, a fine is that they might well be tempted to use it in the case of impecunious defendants, rather than reducing the fine to an appropriate level. Apart from the objection there must surely be to such a sentencing system which, in effect, would suspend fines on the poor but not on the rich, the commission of a further, relatively non-serious, offence within the period of suspension would then place the later court in the invidious position either of ignoring the earlier sentence or activating a fine which would inevitably result in imprisonment by default. There might also be difficulties where the defendant's means had changed substantially between the time of suspension and the hearing of the breach. Of course some of these problems are the inevitable consequence of the operation of the fine as a tariff system, where great variation exists in the ability of different defendants to pay.[19] Introduction of a power to suspend, or partly suspend, fines might well increase these difficulties. On the other hand, a new non-custodial form of penalty, apparently thought desirable today in a not-insignificant number of cases, might be considered to be a useful option available to courts actually faced with a vast range of offenders and offences.

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18. Magistrates' Courts Act 1980, s.35.

19. For further discussion see Ashworth, Sentencing and Penal Policy (1983), pp.285-291.

PART IV : COMPARATIVE APPROACHES

10.1 Wherever the common law of England and Wales has been received in other jurisdictions the system of binding over has formed part of it. In several countries it survives surprisingly intact. Where it has not, it seems that other means have been developed to deal with many of the problems identified in this Working Paper, in particular the appropriate role for "preventive justice" and the question of the degree of flexibility which a legal system should properly have to cater for conduct bordering on criminality. The development of several different approaches in other countries makes a comparative survey particularly helpful in this area. The first part of this survey considers how other parts of the United Kingdom have responded to these problems and the second considers those jurisdictions which have received the common law of England and Wales.

(a) Scotland[1]

10.2 The powers of the Scottish courts, which are to some extent analogous to the power to bind over, are for the greater part now set out in recent statutes although they were previously exercisable variously at common law or under ancient statutory provisions.

10.3 Summary courts have the power on convicting of a common law offence to order an offender to find caution for good behaviour for any period not exceeding 12 months, in the case of a sheriff court, and 6 months, in the case of a district court. This may be ordered in lieu of, or in addition to, imprisonment or a fine. The maximum amount of

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1. We are indebted to Sheriff Nicholson Q.C. for much of the material upon which this account is based.

caution which may be required is £200 in the case of the district court, and the prescribed sum (at present £2000) in the case of the sheriff court.[2] Caution may be found either by "consignation" of the amount with the clerk of the court (i.e. by deposit of cash), or by bond of caution, but the latter method is very rare. Where caution becomes liable to forfeiture, that may be granted by the court on the motion of the prosecutor. "Good behaviour" is not defined, but in practice is taken to mean no more than the refraining from committing further offences. Consequently forfeiture will only be ordered where a further offence has been committed. When an order for caution is made no question of consent arises: it is made in just the same way as any other sentence of the court. If the offender is of good behaviour during the period prescribed in the order he will, at the end of the period, have his money returned to him, together with any interest that may have accrued. The caution is relatively little used by the courts, for two reasons. First, for the caution to be an effective deterrent, the amount of money to be found must, in the view of most Scottish judges, be reasonably substantial. Since there is no provision for this to be found by instalments, it is attractive as a disposal only in cases where the defendant has reasonable means. Second, by its very nature the court has no opportunity to monitor the defendant's behaviour during the period and impose a suitable penalty at the end of that time. By use of a deferred sentence, these drawbacks may be avoided, and, in effect, an order for caution can be made under the guise of a deferred sentence.

10.4 Judges in Scotland had common law powers to defer sentence, but statutory provision for deferred sentences was made in the Criminal Justice (Scotland) Act 1963. The relevant provisions are now to be found in

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2. Criminal Procedure (Scotland) Act 1975, s.284, s.289, as amended.

sections 219 and 432 of the Criminal Procedure (Scotland) Act 1975. These sections provide that it is competent for a court, solemn or summary, to defer sentence after conviction for a period and on such conditions as the court may determine. There is no restriction on the length of time for which sentence may be deferred, and it may be - and commonly is - deferred more than once in respect of a single indictment or complaint. This contrasts sharply with the position in England and Wales.[3] As with the caution, the consent of the defendant is not a prerequisite to sentence being deferred. It seems that the power is normally used for one of three reasons. The first is where the court wishes to allow some time to elapse so that a specific fact relevant to sentence may be established. This may relate to some imminent change in the defendant's circumstances, such as the obtaining of a job or acceptance into the armed services. Or it may be to ascertain the outcome of, for example, a trial which the offender is shortly to undergo in respect of some other charge. The second common reason for deferring sentence is to allow the defendant the opportunity of showing that he can for a period, or periods, which may be quite prolonged, keep out of further trouble. The third common reason is to give the defendant the opportunity to do something specific, such as making restitution to the victim. Conditions attached to a deferred sentence in Scotland may either be specific, such as to repair damage, or general, i.e. to be of good behaviour. Where a court defers sentence for a defendant to be of good behaviour, an indication will normally be given that the defendant will be dealt with less severely if he complies with the condition of the deferment.

10.5 It will be appreciated that neither the deferred sentence nor the caution are analogous to the English power to bind over in so far as that power may be

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3. See para. 10.7, below.

exercised in the case of unconvicted persons, since they both require a conviction before they can be ordered. However, the position is slightly different in relation to probation orders. Under the Criminal Procedure (Scotland) Act 1975, sections 183(1) and 384(1), the Scottish courts, solemn and summary, have power to make probation orders. In general, these are very similar to their English counterparts, but a probation order may be made by a court of summary jurisdiction where the court is satisfied that the person charged committed the offence but without proceeding to conviction. This is similar to the position as it was in England and Wales under the Probation of Offenders Act 1907, before the changes made by the Criminal Justice Act 1948. The court may, and usually does, require the defendant to be of good conduct and not to repeat his offence or commit any further offence, i.e. to be of good behaviour. Comparison may be made with the English sentencing options of probation and deferment of sentence, discussed in paragraphs 9.4. and 9.5. above. It should be noted that there is no power in Scottish courts to discharge an offender conditionally, though he may be discharged absolutely. The absence of the power of conditional discharge may explain, in part, the more creative approach to the use of deferment in Scotland.

10.6 Of crucial importance in this context in Scotland is the very wide ranging crime of breach of the peace which encompasses behaviour which is well beyond the scope of analogous English offences.[4] Breach of the peace may originally have been defined as a "lesser form of mobbing and rioting",[5] and typically it deals with brawling or fighting in public, shouting and swearing in the street or any general tumult or interference with the peace of a neighbourhood. But the offence has also developed as a

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4. See para. 7.3, above.

5. Gordon, Criminal Law (2nd ed., 1978), p.985.

method of maintaining public order and decency. This has been achieved by regarding as included in the crime of breach of the peace any conduct likely to occasion a breach of the peace. This aspect of the offence has been much developed in recent years, although its origins are in the nineteenth century. In Dougall v. Dykes,[6] for example, it was held to be a breach of the peace repeatedly to walk out of church during the service because such behaviour "was calculated to give rise to great irritation and to a determination to suppress it". The use of the word "calculated" is not to be taken to mean that the perpetrator must have intended the result to be a breach of the peace. The test to be applied by the court is an objective one.[7] This was so held in a more recent peeping Tom case where there was no evidence that anyone was in fact alarmed. The offence has also been used in the case of pestering a female to her alarm, even though no words were spoken or gestures made by the defendant.[8] The parallel with the English law on binding over where such conduct does not constitute a crime is clear. One option for reform of English law is to adopt a similar broadly drafted offence. It is certainly possible to criticise the Scottish offence for its vagueness and uncertainty of scope but when considering this option its undoubted drawbacks must be set against the drawbacks of the current English practice of binding over or, if binding over were abolished, a situation where it would not be possible to deal with these matters in the criminal courts at all.

10.7 It is not necessary that acts constituting a breach of the peace should take place in public. A

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6. (1861) 4 Irv. 101, 105.

7. Raffaelli v. Heatly 1949 J.C. 101, per Lord Justice-Clerk Thompson.

8. Mackie v. MacLeod, High Court of Justiciary, March 1971, unreported.

schoolmaster making indecent remarks to pupils in a private room was convicted of breach of the peace.[9] In fact a large number of the cases of breach of the peace which go through the courts are domestic disturbances either arising out of an argument between husband and wife or arising out of one party's reaction to the police presence at the house on account of the earlier arguments. Such breaches of the peace usually consist of shouting and swearing, possibly struggling and fighting or throwing items of furniture, but it is not necessary that the conduct should be violent for it to be labelled as a breach of the peace. Again the parallel with the English law is of interest. In the case of Sinclair v. Annan[10] the defendant was alleged to have made indecent remarks to the female occupier of a house which he was visiting in the course of his employment, and her female companion. The younger of the two women gave evidence that Sinclair's remarks had caused her embarrassment. It was argued for the defence that mere embarrassment was not enough for breach of the peace, but the court rejected this contention, stating that "the remarks in the context in which they were uttered were of a particularly offensive character and there is an express finding of embarrassment on the part of Miss Mackay. In our judgment that was enough ... to justify the conclusion that all the necessary ingredients of the offence of breach of the peace had been made out".[11] This is perhaps the furthest extension of the offence, where mere embarrassing behaviour in private was penalised.

10.8 In conclusion, it is clear that the various methods of disposal referred to above combined with the breadth of the offence of breach of the peace, enable the

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9. Young v. Heatly 1959 J.C. 66.

10. 1980 S.L.T. 55.

11. Ibid., at p.56.

Scottish system to deal with virtually all the types of conduct which in England and Wales are currently the subject of binding over to keep the peace. The position in Scotland, particularly in respect of the ambit of the offence of breach of the peace which is wider than the disorderly conduct offence under section 5 of the Public Order Act 1986,[12] offers an alternative approach, requiring careful consideration.

(b) Northern Ireland

10.9 Northern Ireland's binding over laws are similar to those of England and Wales, but they have been codified for use in the magistrates' courts. The Magistrates' Courts (Northern Ireland) Order 1981 consolidates numerous older enactments concerning Northern Ireland justices of the peace and Resident Magistrates. From section 3 and Schedule 1 of the Order it appears that justices of the peace have powers to bind over deriving from the commissions of the peace, the 1361 Act and various powers contained in Part XI of the Order. Part XI governs the powers of magistrates' courts. Section 127, headed "Recognisances to keep the peace or be of good behaviour", confirms that a magistrates' court can make a binding over order (a) upon a complaint, (b) upon convicting a person (in lieu of or in addition to sentence[13] and (c) in the case of a person present before such court without any formal application to the court to make such order. The maximum duration of a bond is two years. A person refusing to comply with the order can be sent to prison for not more than 6 months or until he sooner complies with the order, whichever is the shorter. Enquiries of the authorities in Northern Ireland have established that powers under the Order are frequently exercised in respect of domestic

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12. See para. 7.4, above.

13. See para. 2.20, above.

disturbances and generally in the disposal of trivial cases. This is almost entirely in a sentencing context; the powers under the 1361 Act to bind over during the course of proceedings are seldom used.

(c) Canada

10.10 The British North America Acts assign to the federal Parliament jurisdiction over criminal law and procedure, while giving to the provinces responsibility for the administration of justice. The administration of justice within a province includes the investigation and prosecution of Criminal Code offences, and matters of "preventive justice". The first Criminal Code of Canada, enacted in 1892, consolidated numerous earlier statutes as well as declaring what the criminal law should be for Canada as a whole. It has been amended and revised many times since. There are also remnants of English law which exist in some provinces but not others. Remarkably, English traditions such as the Commissions of the Peace and 1361 Act still exist in some provinces.

10.11 Section 745 of the current Criminal Code reads, in part, as follows:

> "(1) Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.
> (2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.
> (3) The justice or the summary conviction court before which the parties appear, may, if satisfied by the evidence adduced that the informant has reasonable grounds for his fears,
>
> (a) order that the defendant enter into a recognisance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed 12 months, and comply with such other reasonable conditions prescribed in the recognisance as the court considers desirable for securing the good conduct of the defendant, or

(b) commit the defendant to prison for a term not exceeding 12 months if he fails or refuses to enter into the recognisance."

Section 746 further provides that a person who is in breach of the recognisance is guilty of a summary offence. Thus breach entails both forfeiture of the recognisance and commission of an offence. Under the provisions in the Code, the defendant is not only given notice of the complaint or charge against him but also an opportunity to defend himself.[14] There is no authority under the Code for binding over the complainant or a witness. It will be seen that the limited purpose of these provisions is to allow a justice of the peace to respond to an individual's claim for protection from anticipated injury to self, spouse, child or property. They are not, therefore, well suited to other matters coming within the scope of binding over in the English context, such as public order. These Criminal Code provisions are not redundant, but they do not seem to be extensively used.

10.12 In addition, certain powers to bind over to keep the peace exist outside the provisions of the Code deriving from the commissions of the peace and/or the Justice of the Peace Act 1361. In 1954 it was confirmed by the Supreme Court of Canada that this was the case for the province of Ontario. In MacKenzie v. Martin[15] the Supreme Court applied the English authorities to an Ontario case, in effect ruling that there were in Ontario two species of "preventive justice", under the commissions of the peace and the 1361 Act. In the case the defendant, a blind man, had been pestering his estranged wife, her landlady, and her co-employees, with innumerable annoying telephone calls. On one particular day he had made no fewer than 110 calls.

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14. Re Regina and Shaben et al (1972) 8 C.C.C. (2d) 422, 427 (Ontario High Court of Justice).

15. MacKenzie v. Martin [1954] 3 D.L.R. 417.

Eventually he was brought before a magistrate on an information laid by the police praying for an order "...directing him to find one or more sureties who will be answerable for his good behaviour during such period of time as may seem to the court just, in accordance with the law...". After hearing evidence the magistrate made such an order (lasting 3 years, with two sureties of $1000 each), saying: "We certainly can't have this sort of thing going on in our city, calling people on the telephone and annoying them so much...". In default of finding the sureties the defendant went to jail for 3 months. He then sued the magistrate, in an action for false imprisonment, for allegedly exceeding his jurisdiction when binding him over under the "common law". That suit failed. It was held in the Supreme Court of Canada, on appeal by the defendant, that "the common law preventive justice" was in force in Ontario, nothing in the code having interfered and that the magistrate had not been mistaken in thinking that under this body of law he had power to bind the defendant over to prevent him making innumerable annoying telephone calls.

10.13 In 1972 the Ontario High Court of Justice followed the 1954 decision of the Supreme Court of Canada.[16] The position as regards the commissions of the peace is evidently similar in other provinces. In Poffenroth[17], for example, the defendant had followed a woman in the streets at night; eventually her concern obliged her to call the police. In his judgment the magistrate quoted Avory J. in Lansbury v. Riley[18] to the effect that the statute of 1361 was not exhaustive of the magistrates's jurisdiction; in view of this it was unnecessary for the Calgary magistrate to concern himself with the source of his power, except to

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16. Re Regina and Shaben (1972) 8 C.C.C. (2d) 422, 427.

17. [1942] 2 W.W.R. 363 (Alberta).

18. [1914] 3 K.B. 229.

say in judgment that "Our Code preserves the common law of England not only so far as affords a defence but also so far as may afford a ground of prosecution in cases not expressly provided for...". He bound the defendant over for 12 months in his own bond of $100 with one surety. The status of the 1361 Act, on the other hand, was for a time somewhat chequered in provinces other than Ontario. In 1949 the Court of Appeal in British Columbia concluded that the English power did not exist in that province,[19] but in 1968 it came to the opposite view, following the Supreme Court. New Brunswick accepted the existence of the powers in a decision in 1958.[20] The limited and specific Code powers set out above are now therefore regarded as supplemented in most, if not all, states by powers derived from English common law and ancient statute.

(d) Australia

10.14 It seems that Australia has all the binding over laws of England and Wales, with the addition of further legislation. The general position has been summarised by one writer as follows:[21]

> "Even in the absence of any local legislation, these ancient powers of the justices of the peace were assumed by each of the Australian states at their inception. As with other areas of the law, the law of the new Colonies included so much of the law of England as was reasonably applicable in the circumstances. And it has been said that it is difficult to think of a part of the law of England which would have been more applicable than the existence of the present powers. Except to the extent therefore that the common law has been modified by later local legislation, justices of the peace still retain the power to make a binding

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19. Frey v. Fedoruk [1949] 2 W.W.R. 604; reversed on other grounds, [1950] S.C.R. 517.

20. R ex rel. Murray v. Murray (1958) 123 C.C.C. 20.

21. Flick, Civil Liberties in Australia (1981), p.114.

> over order [of the English type]. In at least two States [New South Wales and Victoria] legislation has specifically stated that the Imperial Statute of 1361... shall continue to apply; and in all States the common law powers have been expanded by other provisions."

10.15 In Victoria the modern position is stated in section 10(1) of the Magistrates' Courts Act 1971 and section 150(1) of the Magistrates (Summary Proceedings) Act 1980. The latter describes the procedure to be followed when the power is to be exercised for the protection of an individual:

> "The power of a magistrates' court to adjudge a person to enter into a recognisance and find sureties to keep the peace or be of good behaviour towards any person shall except where otherwise enacted be exercised by an order upon complaint made in writing and upon oath and in no other way, and the complainant and defendant and witnesses may be called and examined, and the complainant and defendant shall be subject to costs, as in the case of any other complaint."

This would apparently stop a magistrate in Victoria acting "on his own motion", as in England. The 1361 Act is, however, incorporated into the law of Victoria by the Imperial Acts Application Act 1922. It contains the much disputed "not",[22] which makes it possible to bind over "all them that be [not] of good fame, where they shall be found". In the leading Australian case on binding over, a decision of the Supreme Court of South Australia in 1971,[23] the six Australian judges dismissed all defence arguments based on the obsolete words. They decided, in line with the English

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22. See para. 2.2, above.

23. R v. Wright, ex parte Klar [1971] 1 S.A.S.R. 103; Vietnam war demonstration in which K was bound over by the magistrate in the sum of $250 for 12 months "pursuant to the Justices of the Peace Act 1361 and my commission". The Court upheld the order to keep the peace and be of good behaviour, but struck out an additional condition limiting K's political activity.

court in 1914,[24] that "it is too late to pursue these fascinating enquiries for any but academic purposes".

10.16 There are several other specific provisions. Under section 69(3) of the Magistrates' Courts (Jurisdiction) Act 1973, a Victoria magistrates' court trying an indictable offence summarily can dismiss the charge without proceeding to conviction, upon the accused entering into a recognisance to be of good behaviour for a stipulated period. The bond takes the place of a conviction, and breach of its conditions leads to forfeiture of the amount specified in the recognisance.[25] Under section 80 of the Magistrates (Summary Proceedings) Act 1975, there is power for a court where "satisfied that a defendant is guilty of the offence charged ... without proceeding to conviction" to adjourn and allow the defendant to go free upon his entering into a recognisance for his later appearance at a time and place fixed by the court, for his good behaviour in the meantime and for the observance of any special conditions the court thinks proper to impose. This power is apparently frequently used, the opportunity being taken to impose special conditions such as curfew, limitation of use of driving licence, medical attention etc. Under section 58 of the 1975 Act a Victoria magistrates' court may also impose a recognisance, with or without sureties, to be of good behaviour (or to appear for sentence when called upon) upon convicting a person of a summary offence if it "... thinks that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than nominal punishment".

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24. Lansbury v. Riley [1914] 3 K.B. 229, 232.

25. Power, "A review of the Justices' preventive jurisdiction", (1981) 8 Monash Law Review 69.

10.17 The position in Queensland is complex and of interest. Until 1964 the Queensland Justices Acts contained statutory powers enabling magistrates to require sureties of the peace and good behaviour. These were repealed in 1964; by 1973, however, there was talk of re-enactment. Queensland now has a new statute, the Peace and Good Behaviour Act 1982. Whether Queensland magistrates still have the old powers of English justices of the peace, under their commissions and the 1361 Act, is not entirely clear, but it seems that they do. If so, the full range of powers for Queensland judges and magistrates would seem to be:

(a) Judges: (i) articles of the peace and (ii) binding over to come up for sentence.

(b) Magistrates: (iii) the "merged" powers under their commission on appointment and the 1361 Act and (iv) powers (mainly not new) under the Peace and Good Behaviour Act 1982.

(c) Both judges and magistrates: (v) power to bind to good behaviour "without recording a conviction", under the Queensland Code and (vi) power to bind to good behaviour after passing sentence of imprisonment and suspending its execution, under the Queensland Code.

10.18 Articles of the peace is a procedure whereby "any person may, by leave of the Court or a Judge, file... 'Articles of the Peace' setting forth that some other person has threatened to do the complainant, or to his wife or child, or to some person under his care or charge, some bodily injury, or to burn or injure his house, or otherwise to commit some breach of the peace towards him...."[26] The

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26. Carter's Criminal Law of Queensland (5th ed., 1979), p.721.

court may require the person so accused to find sufficient sureties to keep the peace. Similarly, the 1982 Act gives to a threatened person a procedure whereby he or she can complain, in writing on oath, to a justice of the peace. The matters of complaint are similar to the "articles" mentioned above. The court's powers under the Act are very wide. The court may add any stipulation it wishes to the general requirement that the accused keep the peace and be of good behaviour. The court may set whatever limit of time it thinks fit. Failure to comply with such an order is a summary offence. Section 657A of the Queensland Criminal Code permits a judge or magistrate, in the light of extenuating circumstances, to discharge a person found guilty without recording a conviction, either absolutely or upon recognisance and to appear for conviction and sentence when called upon. Section 656 permits a court to suspend the execution of a sentence of imprisonment, upon the defendant entering into a recognisance in such sum as the court directs, to be of good behaviour when (a) the offender has not been previously convicted of an offence for which his liberty could have been restricted for 6 months or more, and (b) the crime for which he is presently convicted has not required a sentence of imprisonment of more than three years.[27]

10.19 In addition to the old English common law powers and the powers under state legislation, there are further binding over powers available under Commonwealth laws. The "Federal" Act is distinguished from its parent, the Crimes Act 1900-1968 of New South Wales, by its title of the Crimes Act (Cth) 1914-1966. It applies to "Commonwealth crimes" committed within states. The binding over part of the Crimes Act (Cth) originated in Stephen's Draft Code of criminal law and procedure of 1879, or in the English statutes underlying that Draft Code. Sections 19

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27. See ibid., pp.554 and 557.

and 20 provide for conditional release of convicted and unconvicted persons by way of recognisance.

(e) New Zealand

10.20 New Zealand magistrates have powers of binding over to keep the peace and be of good behaviour (a) under the old "English" powers of their commissions and the 1361 Act and (b) under the Summary Proceedings Act 1957. As in England, the powers are available whether the defendant has been convicted or not. The leading case on the old powers in New Zealand is Goodall v. Te Kooti[28] in 1890. Since that time there has been a history of attempted codification of binding over laws, culminating in the Summary Proceedings Act. This includes provisions headed "Conservation of the Peace", and is a complex compound of arrangements for the protection of individuals and their houses, precautions against annoying and provocative behaviour towards or in the presence of the complainant and restraint on "common annoyances". If the court considers that there is "good ground" to do so and there is "just cause" to fear the anticipated or threatened action, or, in the case of annoyance, it feels that the conduct is likely to be repeated, it may order the defendant to enter into a bond, with or without sureties, for such sum as it thinks fit, to keep the peace towards the complainant and refrain from the apprehended action. This may be done either (a) on the hearing of a complaint or (b) when a person has been charged with an offence, whether or not convicted of that offence, and whether or not any penalty is imposed. Duration of the bond is limited to one year, and refusal to enter bond, or failure to obtain sureties, can lead to imprisonment for not more than two months.

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28. (1890) 9 N.Z.L.R. 26 (C.A.).

10.21 Re-enacted in section 18 of the Crimes Act 1961 is a power known as "putting under bond". Where an offender is convicted on indictment of a crime for which he is liable to be imprisoned for not more than 3 years the court may, instead of or in addition to imposing any other punishment, order him to enter, with or without sureties, into a bond in such sum as the court thinks sufficient, on condition that he keeps the peace and is of good behaviour for such time, not exceeding 3 years, as the court fixes. New Zealand writers state that these powers are little used[29] because most of the crimes under the Crimes Act are punishable with more than 3 years' imprisonment and also because judges have powers to make formal supervised probation orders under section 7(g) of the Criminal Justice Act 1954 which, as well as requiring the probationer to report to his probation officer, always require him "to be of good behaviour and commit no offence against the law". An interesting case showing the limitation of "putting under bond" occurred in 1982.[30] Eight young men and women decided to protest against the forthcoming Springbok rugby tour, boarded an Air New Zealand flight to Wellington without tickets and refused to get off. On being convicted of statutory offences having statutory maxima of less than 3 years, they were put under bond for two years. It was held in the Court of Appeal, however, that the section was "preventive" rather than "punitive" and that there was nothing in the evidence to suggest that any of the defendants were minded to break the peace, or otherwise misbehave, in the future. The bonding orders were therefore quashed.

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29. E.g. Doyle, Criminal Procedure in New Zealand (1978), p.69; Adams, Criminal Law and Practice in New Zealand (2nd ed., 1971), p.78, n.261.

30. R v. Susan Bradford and others C.A. 136-143/82.

10.22 While little use is made in New Zealand of provisions for binding over unconvicted defendants on complaint, the substantive law has long had provision for widely-drafted summary offences. The most recent of these, section 4(1)(a) of the Summary Offences Act 1981, creates a summary offence of behaving in an offensive or disorderly manner in or within view of any public place. The scope of this offence has been the subject of frequent consideration by the courts. For example, in the leading case of Melser v. Police,[31] the New Zealand Court of Appeal said that:

> "... a person may be guilty of disorderly conduct which does not reach the stage that it is calculated to provoke a breach of the peace, but not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present."

It seems that in New Zealand, as in Scotland, many of the situations which in England and Wales might be expected to be dealt with by way of binding over, whether before or after conviction, are there covered in practice by the broadly-drawn offence of disorderly behaviour and other offences under the 1981 statute.

(f) The United States

10.23 Examination of the complex position in the United States is limited to a brief survey of the law in just two selected states, and of the provisions applying in federal criminal courts. Of particular interest are the so-called "peace bonds".

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31. [1967] N.Z.L.R. 437. See also Wainwright v. Police [1968] N.Z.L.R. 101; Kinney v. Police [1971] N.Z.L.R. 924; Messiter v. Police [1980] 1 N.Z.L.R. 586.

10.24 In Pennsylvania the "peace bond" has had a history co-extensive with that of the State. Penn's Code, including the statutory peace bond, was enacted in the colony in 1682. The peace bond took the form:[32]

> "That whatsoever person shall threaten another to wound, kill or destroy him or harm him in his person or estate, and the person so threatened ... solemnly testify ... that he hath ground given him to believe that from such threatening he is in danger to be harmed either in body or estate; [then] every such person so threatening as aforesaid shall be bound over with two sufficient sureties to appear at the next sessions of the County Court to be holden for such respective county, and so to be proceeded against according to law, and to be bound to the peace or good behaviour."

Penn's bond stood little changed in Pennsylvania's laws until 1909, when it was felt that too much cost was being incurred at the quarter sessions by the reception of too many "trivial cases" from applications "often hastily and thoughtlessly made".[33] The essential core of the bond was not changed but it was made more difficult to obtain. The justice of the peace to whom the application was made had first to invite the parties to compromise their differences. If this failed, he then had to make a full investigation of the facts and only bind over the defendant if the evidence showed that the prosecutor's danger was "actual". By 1971 the President Judge of the Family Division of the Common Pleas Court of Allegheny County concluded that the statutory peace bond procedure was criminal rather than civil in nature. The Court therefore declared the existing procedure unconstitutional because it lacked the usual safeguards of criminal proceedings and because it discriminated unfairly between those who were rich enough to

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32. George, Nead and McCamant, Charter to William Penn and Laws of the Province of Pennsylvania (Harrisburg 1879), p.144, at p.210.

33. Historical note in Pa. Stat. Ann. tit. 19 s.24 (1964).

put up a bond and those that were not.[34] It thus violated the "due process" and "equal protection" clauses of the United States and Pennsylvania constitutions. The Pennsylvania Supreme Court[35], however, disagreed with the lower court.

10.25 Pennsylvania is unique in not only having received the 1361 Act from England (as did many North American provinces) but also for having re-incorporated its relevant parts into state law by new legislation. This was done in 1808. In 1952, however, the Pennsylvania Superior Court dealt with a case of a man acquitted of assault, battery and resisting arrest who had been bound over under the 1361 Act in the sum of $1000 for two years.[36] The order was quashed. The Court was of the view that the practice of requiring a defendant acquitted of a criminal charge to give a bond to keep the peace was contrary to fundamental law and against common sense and an enlightened sense of justice. Moreover, the 1361 Act was on its face, and in practice, fatally defective because of vagueness, and contrary to the "due process" clauses of the United States and Pennsylvania constitutions. The Court summarised its view in the following terms:[37]

> "Finally we may state of record that the essentially real basis of our decision is that we consider the practice under review to be wrong.... The practice of binding over after acquittal ... is an anachronism; it is a vestige of a social form which has passed and it cannot co-exist with the modern concept of due process...."

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34. See Laskow, "Pennsylvania's surety of the peace statute is a violation of due process and equal protection", (1971) 76 Dick. L.R. 204.

35. Commonwealth v. Miller (1973) 305 A.2d 346.

36. Commonwealth v. Franklin (1952) 92 A.2d 272.

37. Ibid., at p.292.

Despite the emphatic terms of this judgment, it appears that the case was limited to the practice of imposing bonds on acquitted persons and did not strike down the statute altogether.[38]

10.26 Texas is representative of the younger States of the union, whose provisions for security of the peace might be expected to differ from other states where the laws had a closer connection with England and Wales. Indeed, Texas never adopted the 1361 Act in any form. Nonetheless Texas laws contained a peace bond from the inception of the state in 1836 after it declared itself independent of Mexico.[39] Justices of the peace were to be conservators of the peace, with power to take "all manner of recognisances with or without security for good behaviour to keep the peace". By 1895 the original bond had been elaborated into a full code within the Texas code of criminal procedure, the reference to good behaviour being dropped, but the principle remaining intact. Section 115 of the Code stated:[40]

> "When the person accused has been brought before the magistrate he shall hear proof as to the accusation, and if he shall be satisfied that there is just reason to apprehend that the offence was intended to be committed, or that the threat was seriously made, he shall make an order that the accused enter into bond in such sum as he may in his discretion require, conditioned that he will not commit such offense, and that he will keep the peace towards the person threatened or about to be injured, and towards all others for one year from the date of such bond."

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38. See J.F.S., "Peace and Behaviour Bonds", (1966) 52 Va.L.R. 914, 920.

39. See Meier and Crain, "The role of lawyers at the birth of the Texas Republic" (1974) 37 Texas Bar J. 1039.

40. Von Boeckmann, Revised Statutes of the State of Texas (Austin 1895), p.18.

If the defendant "failed or refused to give bond" he was under section 120 to be committed to jail for one year. Re-codifications in 1911 and 1925 brought no major changes; this occurred only with the introduction of a new state criminal code in 1965.

10.27 The biggest change under the present code (1965) is that the accused has the right to make an "appearance bond" pending the peace bond hearing. Formerly, when a complaint had been made, the defendant had to remain in jail until the hearing. He can now be at liberty on giving bond to keep the peace etc., and this will be without prejudice to the merits of the case. A person bound is no longer required to keep the peace towards the threatened person and all others but only towards "all others named in the bond". The maximum duration of the bond, and the maximum imprisonment on "failure to give bond" is unchanged at one year, and a magistrate can still order a peace officer to protect the person or property of a threatened individual.[41]

10.28 While anxieties have been expressed about the constitutional position of certain aspects of the peace bond under the 1965 Code, it appears to be still in use. In 1970, in Dallas County, 7316 peace bond cases were filed,[42] a frequency of use higher than any other jurisdiction studied, other than England and Wales.

10.29 The federal peace bond was introduced by statute in 1798, enabling judges to require a party to keep the peace and be of good behaviour in all cases arising under the Federal Constitution and laws. The leading case still seems to be the binding of a potential spy soon after

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41. Tex. Code. Crim. Proc. Ann. Arts.7.02-7.15 (1966).

42. Steele, "Constitutionality of peace bonds", (1973) 36 Texas Bar J. 305.

the beginning of the Civil War, in 1861.[43] He was required to enter recognisance for $10,000, with two sureties, "to keep the peace and be of good behaviour in all cases arising under the Constitution and the laws of the United States". The current general power dates from 1968:[44]

> "The justices or judges of the U.S., the U.S. magistrates, and judges and other magistrates of the several States who are or may be authorised by law to make arrests for offences against the U.S., shall have the like authority to hold to security of the peace and good behaviour in cases arising under the Constitution and laws of the U.S., as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognisable before them."

The procedure to be followed when exercising these powers is to conform to the Federal Rules of Criminal Procedure so far as they are applicable.

(g) Conclusions

10.30 A few observations can be made upon this comparative survey. Detailed conclusions are difficult to draw, but it seems to us that the following points emerge, which are helpful in considering options for law reform:

(a) The other jurisdictions considered here have all found the need to deal, in some form or another, with behaviour currently catered for in England and Wales by binding over to keep the peace or to be of good behaviour. Several countries, at least initially for historical reasons, have adopted a very similar scheme. The principal contrast is with Scotland and New Zealand, where the availability of broad criminal offences catering for minor disorder and annoyance seems to entail that powers to bind over are not necessary.

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43. U.S. v. Greiner (1861) 26 Fed.Cas. No.15, 262.

44. U.S.C.A. 18, para. 3043.

(b) In those countries which have adopted binding over to keep the peace there have, inevitably, been legislative developments. These changes seem to have been towards rather tighter definition of the powers and procedures (e.g. Northern Ireland, Queensland) and, in some places, pressure for abolition or curtailment (e.g. Queensland, North America). If a legislative trend can be identified it would seem to be a growing acceptance, by way of codification, of the importance of procedures whereby a citizen may go to a court to seek protection from another citizen whom he believes will cause personal injury to him or another member of the family. Section 745 of the Canadian Criminal Code is one example, the Texas peace bond is another. On the other hand the powers equivalent to the 1361 Act have been under attack in other countries, particularly North America, on constitutional or due process grounds. If this is so, then the broad concept of "keeping the peace" is gradually becoming more applicable to the defusing of potential trouble between individuals rather than in constraining aberrant behaviour for the perceived public good. It follows that "binding over" in other countries is increasingly seen as a remedy to be sought by an individual, rather than as an aspect of police control of public order.

(c) In several of these countries, binding over to keep the peace forms some aspect of the powers available to the sentencer. Variations are many, from the Scottish "caution", which requires the defendant to deposit a sum with the court, which he forfeits if he commits a further offence to "putting under bond" in New Zealand. Common to all these variations, as with binding over to keep the peace and binding over to come up for judgment in England and Wales, is the threat of forfeiture or punishment for breach, as a means of constraining the person to good conduct for a given period.

PART V : THE WAY FORWARD

11.1 This Working Paper recommends no single course of action on binding over to keep the peace. Our object is to present a number of options for reform of the law and to invite comment from all interested parties. We have been mainly concerned to identify the issues of principle involved in the existence and use of these powers, though attention has also been given to some of the complexity and uncertainty which attends their operation in practice.

11.2 We have been led to the view that the current law on binding over to keep the peace is in an unsatisfactory state. There is a clear need, at the very least, for a re-statement of the existing powers in statutory form. We believe, however, that we should go further than this, not least because simple re-statement might only preserve the uncertainty and contradiction within the existing powers. The direction for law reform in this area should be foreshadowed by initial decisions on the issues of principle underlying the existence and operation of the powers. We would welcome views on the appropriate role for powers to bind over to keep the peace in a modern legal system. Can they be supported in terms of "preventive justice", in some other way, or not at all?

11.3 We believe that it is helpful to divide the powers to bind over to keep the peace into two, depending on whether they are exercised as part of the sentencing process or not. If not exercised as part of the sentencing process, then a second distinction, between powers exercised on complaint under the Magistrates' Courts Act 1980 on the one hand and the Justices of the Peace Act 1361 and common law on the other, is also helpful.

11.4 Binding over to come up for judgment falls outside our terms of reference and we make no proposals with regard to it.

11.5 We invite comment on the desirability of abolition of certain specific powers to bind over which appear merely to duplicate other powers:

(i) powers preserving order in court, given the availability of section 12(1) of the Contempt of Court Act 1981;

(ii) powers to bind over pending hearing of a charge, given the provisions of the Bail Act 1976.

11.6 We would especially welcome comment on what we regard as the central question here: the proper role of powers to bind over to keep the peace in a modern legal system. A number of arguments of principle which entail criticism of the present powers have been identified:

(i) that the whole concept of binding over prior to conviction is unconstitutional and contrary to fundamental tenets of the law of England and Wales in that a person who has not been convicted of a criminal offence and who may not have acted contrary to the criminal law may be required to enter into a formal undertaking to keep the peace or be of good behaviour, on pain of imprisonment for refusal, in proceedings where procedural safeguards are limited. In addition, the usual burden and standard of proof need not have been discharged;

(ii) that whilst a person is invited to "consent" to be bound over, this consent is unrealistic since failure to comply results in immediate custody;

(iii) that witnesses or complainants coming to court may find themselves required to enter into recognisances for their own behaviour without notice of the evidence against them, without the normal requirements of proof and with limited procedural safeguards;

(iv) that it is unjust that an acquitted defendant can nevertheless be bound over;

(v) that the scope of activities on the part of the person concerned which can trigger the operation of the powers is unclear, particularly where the justices apply their own standards to decide whether the defendant's behaviour was "contrary to a good way of life";

(vi) that if a person is to be made subject to sanctions arising from his behaviour, the only proper way for this to be done is to create a specific criminal offence;

(vii) that there is lack of authority on precisely what standard of behaviour is required of the person who is bound over;

(viii) that there is unfettered discretion over the setting of the length of the period of the bind over and the amount of the recognisance.

11.7 Some arguments of principle may be advanced in support of present binding over powers:

(i) that the powers exemplify the notion of preventive justice which consists in the court taking action to restrain a person from committing a crime, or doing some other act injurious to members of the community, which he may commit but has not yet committed;

(ii) that it is useful that the law should not be powerless to respond to minor social nuisances which may be too trivial to be classified as crimes.

11.8 A number of practical arguments have been advanced in support of the operation of current powers:

(i) that binding over allows the courts to deal with certain forms of behaviour which, although not contrary to the criminal law, or where the evidence may be insufficient to gain a conviction, has caused or may have caused anxiety, nuisance or disturbance to members of the public and which cannot be dealt with in any other way by the criminal courts;

(ii) that binding over can be used by the courts as a means of defusing difficult confrontational situations by, for example, binding over both parties to a neighbour dispute or providing a means for the police to remove the aggressor from the scene of a matrimonial disturbance;

(iii) that binding over gives a person a warning for the future but does not, at least formally, give him a criminal record;

(iv) that binding over prior to conviction saves court time and public money which would otherwise be expended in pursuing the case to its outcome, though this begs important questions about prosecution decision-making.

11.9 Do these conflicting arguments lead to different conclusions with respect to the powers under the 1361 Act and the complaint procedure under the Magistrates' Courts Act 1980?

11.10 Turning to the main binding over provisions, it is appropriate to deal with the 1361 Act first. We invite comments on the proper approach to reform of these powers. Possibilities include:

(i) Abolition of the powers. If the powers were abolished, would there be greater expenditure of court time and public resources to deal with these cases? Or would there be changes in prosecution decision-making such

that these cases did not come to court at all? Should we seek to make special provision, by way of new criminal offences, for certain people such as the peeping Tom or the poison-pen letter writer, formerly covered by binding over, which the courts would then be powerless to deal with? Or should incidents involving no substantive criminal offence not come before the criminal courts at all? Should further thought be given to the creation of a broadly-defined offence covering minor disorder, misbehaviour and annoyance, such as "breach of the peace" in Scotland?

(ii) Restriction of the powers to use at the sentencing stage, when dealing with convicted defendants.

(iii) Restriction of the powers to defendants, convicted or acquitted, though with improved procedural safeguards.

(iv) Restriction of the powers to defendants, at any stage of criminal proceedings, though with improved procedural safeguards.

(v) Continuing use of powers in respect of defendants at any stage of the proceedings and other persons before the court, though with improved procedural safeguards. In this and the two previous options, what procedural improvements should be implemented?

11.11 With respect to the complaint procedure under the Magistrates' Courts Act 1980, possibilities for reform include:

(i) Abolition of the powers. If they were abolished, what would be the implication for the handling of domestic disturbances? Some alternative remedies exist, though these do not extend to all situations covered by binding over. Would it, for example, be appropriate to think in terms of extending existing magistrates'

jurisdiction to grant non-molestation orders in family cases, at least as far and perhaps going beyond powers currently enjoyed by the higher courts?

(ii) Restriction of the powers so that only defendants may be bound over, though with improved procedural safeguards.

(iii) Continuing use of the powers in respect of defendants and other persons before the court, though with improved procedural safeguards. In this and the previous option, what procedural improvements should be implemented?

11.12 Is it appropriate for binding over to keep the peace to be available as an order additional to the sentencing powers of a criminal court? Possibilities for reform are:

(i) Abolition of these powers, if they provide nothing which could not be achieved by the proper use of statutorily defined sentencing powers, in particular that of conditional discharge.

(ii) Abolition of the powers, together with amendment of existing sentencing laws so that it would be possible for the courts to combine together a conditional discharge and a fine.

(iii) Abolition of the powers, together with creation of a new sentencing option: a power in the sentencing court to suspend, or partly suspend, a fine imposed for the offence.

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